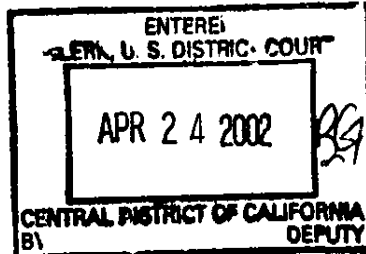
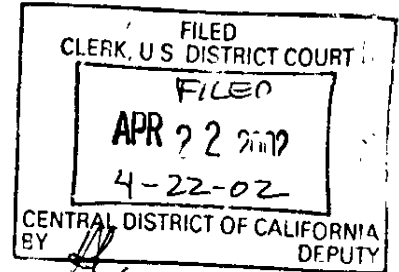


Priority ☒
 Send ☒
 Enter ☐
 Closed ☐
 JS-5/JS-6 ☐
 JS-2/JS-3 ☐
 Scan Only ☐



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | | |
|--------------------------|---|-------------------------|
| PERFECT 10, INC., |) | |
| |) | CV 01-2595 LGB (SHx) |
| Plaintiff, |) | |
| |) | |
| v. |) | ORDER GRANTING |
| |) | PERFECT 10'S MOTION FOR |
| CYBERNET VENTURES, INC., |) | PRELIMINARY INJUNCTION |
| et al., |) | |
| |) | |
| Defendants |) | |

I. INTRODUCTION

This action springs from Perfect 10, Inc.'s ("Perfect 10") allegations that defendant Cybernet Ventures, Inc. ("Cybernet"), a corporation running a web-service called "Adult Check," and other defendants infringe Perfect 10's copyrights, violate Perfect 10's trademark rights and otherwise engage in rampant unfair business practices.

Currently before the Court is Perfect 10's Request for a Preliminary Injunction, which requests relief against a variety of defendants. The Court has received Perfect 10's motion, defendants Cybernet and Laith Alsarraf's oppositions, and Perfect 10's reply. These briefs are supported by voluminous supporting

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papers (and the accompanying evidentiary objections).

II. INITIAL EVIDENTIARY OBJECTIONS

In support of its motion for preliminary injunction, Perfect 10 submitted 117 exhibits attached to the declaration of Norman Zadeh, Ph.D. ("Zadeh Decl."), 16 exhibits attached to the declaration of Daniel Farmer ("Farmer Decl.") and 13 exhibits attached to the declaration of Jeffrey Mausner ("Mausner Decl."). Perfect 10 supplemented these declarations with several others. Cybernet basically objects to every exhibit attached to the Zadeh and Farmer declarations, as well as two exhibits attached to the Mausner declaration. In addition Cybernet has raised objections to portions of declarations filed by Zadeh, Farmer, Mausner, Laurence Rudolph ("Rudolph Decl."), Selma Rubin ("Rubin Decl.") and John Baruck ("Baruck Decl.).

Perfect 10 has also raised objections to evidence submitted by Cybernet. Perfect 10 objects to a single paragraph in the declaration of Timothy Umbreit ("Umbreit Decl.") and to ten paragraphs in the declaration of Frederick Lane III ("Lane Decl."). Before the Court makes its findings of fact under Federal Rule of Procedure 65, it will address these objections. It will do so, however, only in broad strokes.

A. AUTHENTICATION OBJECTIONS

The great bulk of Cybernet's objections center on Perfect 10's exhibits printed off of the internet. See Cybernet Evidentiary Objections ("Def. Obj.") at 1-5. Cybernet argues these exhibits are insufficiently authenticated. See, e.g., id.

1 at 1. In support, Cybernet points to two cases, United States v.
2 Jackson, 208 F.3d 633, 637 (7th Cir. 2000), cert. denied, 531
3 U.S. 973 (2000), and St. Clair v. Johnny's Oyster & Shrimp, Inc.,
4 76 F. Supp. 2d 773, 774 (S.D. Tex. 1999).

5 The Jackson court upheld the exclusion of certain web
6 postings attributed to white supremacist groups because they were
7 insufficiently authenticated. 208 F.3d at 638. As the court
8 viewed the situation, the criminal defendant in the case had to
9 show that the postings, in which these groups appeared to claim
10 responsibility for a series of racist mailings, actually were
11 posted by the groups, as opposed to being slipped on the groups'
12 web sites by the defendant, who was a skilled computer user. Id.

13 The St. Clair court took a more extreme view over the
14 admissibility of data taken from the United States Coast Guard's
15 online vessel database concerning the ownership of a vessel. 76
16 F. Supp. 2d at 774. The court viewed the internet as "one large
17 catalyst for rumor, innuendo, and misinformation," stated that
18 there was "no way" the plaintiff could overcome "the presumption
19 that the information . . . discovered on the Internet is
20 inherently untrustworthy." Id. The court then excluded the
21 information as hearsay, rather than "relying on the voodoo
22 information taken from the Internet." Id.

23 Although these out-of-circuit cases are informative
24 concerning the potential pitfalls of internet-based documents,
25 this Court must look to the Ninth Circuit for guidance. In United
26 States v. Tank, 200 F.3d 627, 630 (9th Cir. 2000), the Ninth
27
28

1 Circuit addressed the admissibility of certain chat room logs. In
2 Tank, the government initiated a prosecution against a child
3 pornography suspect after a search of another suspect's computer
4 files revealed "recorded" online chat room discussions among
5 members of an internet club focused on discussing, trading, and
6 producing child pornography. 200 F.3d at 629. The recorder of
7 these chat room discussions had deleted from his computer
8 nonsexual conversations and extraneous material, such as date and
9 time stamps. Id.

10 The Tank court observed that the foundational requirement of
11 authentication is satisfied by evidence sufficient to support a
12 finding that the matter in question is what its proponent claims.
13 See 200 F.3d at 630 (citing Fed. R. Evid. 901(a)). This burden is
14 met when "sufficient proof has been introduced so that a
15 reasonable juror could find in favor of authenticity." Id.
16 (citations omitted). This burden was met where the producer of
17 the logs explained how he created the logs with his computer and
18 stated that the printouts appeared to be accurate
19 representations. Id. Additionally, the government established the
20 connection between Tank and the chat room log printouts. Id.

21 The Court finds that Zadeh's declaration adequately
22 establishes the prima facie case for admissibility in claiming
23 the exhibits attached to his declaration were either:
24
25
26
27
28

- 1) true and correct copies of documents produced by Cybernet in discovery (identified by a CV prefix);
- 2) true and correct copies of pictures from Perfect 10 Magazine or from Perfect 10's website; or
- 3) true and correct copies of pages printed from the Internet that were printed by Zadeh or under his direction.

Zadeh Decl. ¶ 7. Those webpages that fall under category (3) contain the internet domain address from which the image was printed and the date on which it was printed. Id. ¶ 8.

The first category is covered by Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881, 889 n.12 (9th Cir. 1996) (discovery documents deemed authentic when offered by party-opponent). See also Orr v. Bank of America, NT & SA, - F.3d -, 2002 WL 507525 *1, *6 n.20 (9th Cir. 2002) (citing to same). The second and third categories have met the *prima facie* burden because the declarations, particularly in combination with circumstantial indicia of authenticity (such as the dates and web addresses), would support a reasonable juror in the belief that the documents are what Perfect 10 says they are. See Tank, 200 F.3d at 630. Moreover, because computer printouts are the only practical method by which the allegations of the complaint can be brought before the Court and there is generally a reduced

1 | evidentiary standard in preliminary injunction motions,¹ the
 2 | Court finds that, as a general rule, Zadeh's declaration is
 3 | sufficient to establish the exhibits' authenticity.²

4 | This is particularly true with regard to e-mail
 5 | communications attributed to Brad Estes. Mr. Estes's deposition
 6 | testimony establishes that it is part of his duties to respond to
 7 | posts in Adult Check's "webmasters lounge" and that he responds
 8 | to e-mails from webmasters concerning aspects of Cybernet's
 9 | "Adult Check" program. Mausner Decl., Ex. C at 94-97.

10 | **B. E-MAILS BETWEEN CYBERNET EMPLOYEES AND THIRD**
 11 | **PARTIES**

12 | Cybernet does not object to the Court's consideration of the
 13 | communications purportedly made by Cybernet's employees "if the
 14 | Court were to accept Plaintiff's scanty authentication" but does
 15 | object to consideration of the communications attributed to third
 16 |

17 | ¹See, e.g., Asseo v. Pan-America Grain Co., Inc., 805 F.2d
 18 | 23, 26 (1st Cir. 1986) ("affidavits and other hearsay materials
 19 | are often received in preliminary injunction proceedings").

20 | ²Perfect 10 has attempted to further elaborate on the
 21 | authentication issue in its Reply to Evidentiary Objections
 22 | ("Evid. Reply") and in Norman Zadeh's Second Declaration ("Zadeh
 23 | Decl. II") ¶¶ 3-7, but the Court did not consider this
 24 | information. Despite the general admissibility of these exhibits,
 25 | there are individual exhibits that are insufficiently
 26 | authenticated, see, e.g., Zadeh Decl, Ex. 17, and the Court does
 27 | not rely on them in its findings of fact. Because of the sheer
 28 | volume of evidentiary objections, the Court's discussion must be
 held at a certain level of generality. Where either party's
 arguments on admissibility are persuasive, the Court simply
 disregards the problematic piece of evidence. The findings of
 fact that follow rest on evidence the Court finds admissible or
 proper for consideration in the context of this motion.

1 parties on hearsay grounds. See Evid. Obj. at 3. The Court treats
2 the communications attributable to Cybernet employees as party
3 admissions and will accept the third party communications only
4 insofar as they indicate notice of infringing or potentially
5 infringing activity.³ See Fed. R. Evid. 801.

6 **C. PRINTOUTS FROM THE THIRD-PARTY WEBSITES**

7 Cybernet objects to the printouts from third-party websites
8 as a violation of the rule against hearsay. See Fed. R. Evid.
9 801. To the extent these images and text are being introduced to
10 show the images and text found on the websites, they are not
11 statements at all - and thus fall outside the ambit of the
12 hearsay rule.⁴ To the extent that Perfect 10 relies on
13 directories and the like as assertions that the links provided
14 actually connect to the subject matter claimed in the link, the
15 Court finds the hearsay issue to be a closer question. The Court
16 will deal with this issue, should it arise, on a case-by-case
17 basis. As for any asserted connection between those sites and
18 Adult Check (Cybernet), the Court finds the evidence of
19 Cybernet's business structure and the workings of Adult Check's
20 age verification program combined with statements identifying the
21

22 ³There are several exhibits attributable to employees other
23 than Brad Estes. These are authenticated through the discovery
24 process, but the Court also finds that they should be
25 appropriately considered because there is no indication that any
of these employees have been deposed as of yet.

26 ⁴When used for this purpose, the Court assumes they are
27 subject to the best evidence rule, Fed. R. Evid. 1001. The Court
finds that these printouts meet the Rule, for present purposes.

1 individual websites as Adult Check sites are enough to establish
2 the sites' membership in the Adult Check program. This takes the
3 various printouts outside the definition of hearsay, for this
4 purpose. See Fed. R. Evid. 801(d)(2)(D).

5 **D. OBJECTION TO CHART**

6 Perfect 10 has prepared a chart ("Chart 1") outlining
7 examples of infringing conduct it claims has been or can be found
8 on websites affiliated with "Adult Check." Zadeh Decl., Chart 1.
9 Cybernet argues that the Zadeh declaration has failed to
10 adequately establish how the chart was compiled, fails to lay an
11 adequate foundation and that its descriptions of exhibits are
12 confusing or inaccurate. Evid. Obj. at 5. The Court finds these
13 objections, as a general matter, to be without merit.

14 The chart simply reiterates information found elsewhere,
15 including the website where the information was found, the date
16 of download, Perfect 10's claimed infringement, a brief
17 description, which copyright registration covers the claimed
18 Perfect 10 images, and an assertion concerning rights of
19 publicity. To the extent this information is found on the face of
20 each exhibit it is unobjectionable. Further, any errors in
21 describing the contents are easily confirmed by visual inspection
22 of the exhibits. Finally, Perfect 10 has provided information
23 supporting its claimed copyrights and rights of publicity. The
24 Court finds no reason to exclude Chart 1 and has found it a
25 helpful reference in its review of the voluminous documents
26 provided.

E. REPLY EVIDENCE

Perfect 10 has supplied the Court with a significant volume of reply evidence. Perfect 10 claims most of this evidence is directed at arguments made by Cybernet that this motion should be barred by laches or the doctrine of "unclean hands," challenges to Perfect 10's claims of copyright ownership, and Cybernet's claims to be effectively policing the websites making use of the "Adult Check" brand. Cybernet moved *ex parte* for an order striking all this evidence, which the Court denied in a previous minute order. Nevertheless, for reasons that will become clear the Court has felt no need to consider any of this proposed rebuttal evidence, although isolated exceptions to this general rule will be noted as they appear.

F. OBJECTIONS TO CYBERNET'S DECLARATIONS

The Court sustains Cybernet's objections to the Lane Declaration's ¶¶ 70, 71, and 81, except to the extent they may be used as party admissions.

III. FINDINGS OF FACT

Pursuant to Fed. Rule of Procedure 52(a), the Court makes the followings findings of fact:

Perfect 10

1. Plaintiff Perfect 10, Inc. ("Perfect 10") was formed in 1996 by Norman Zadeh, who has occupied the post of Chief Executive Officer ("CEO") since Perfect 10's formation. Zadeh Decl., ¶ 2.

2. Mr. Zadeh received his Ph.D. in Operations Research in 1972, spent some time working in IBM's computer research department, and has taught applied mathematics as a visiting professor at Stanford, UCLA, U.C. Irvine, and Columbia Universities. Id., ¶¶ 3,4.

3. Armed with a single idea - that there was a market for "classy" pictures of nude women without breast implants, cosmetic surgery, or the like - Perfect 10 was formed. Jenal Decl., Ex. L at 94.

4. Although Mr. Zadeh did not prepare a formal business plan before launching Perfect 10, he had some idea of the costs involved and an idea of how the magazine would develop. Id. at 93; Request for Judicial Notice, Ex. 1 ("Bacon's article") at 4.⁵

5. Since Perfect 10's formation, it has built its circulation up to approximately 90,000 issues.⁶ Zadeh Decl., ¶ 9.

⁵Perfect 10 has not objected to Cybernet's request for judicial notice of this newspaper article.

⁶For purposes of this motion, the Court finds that Zadeh's role as CEO and familiarity with all aspects of Perfect 10's business lays an adequate foundation for information related to Perfect 10's market position, particularly as the Court finds the majority of Zadeh's testimony and declaration credible.

6. Perfect 10 created a website, Perfect10.com, in 1996.
Id.

7. Perfect10.com receives about 100,000 visitors each month. Id. There is no indication how many paid subscribers Perfect10.com has attracted.

8. Perfect 10's first magazine was published in 1997.
Jenal Decl., Ex. L at 97.

9. Since Perfect 10's inception it has created approximately 3,000 photographic images. Zadeh Decl.,
¶ 12.

10. Perfect 10 sells memberships allowing access to Perfect10.com at a rate of \$25.50 per month to persons 18 years and older. Id., ¶ 13.

11. Despite Perfect 10's costs per individual picture rising into the thousands of dollars, Perfect 10 has not been profitable. See Jenal Decl., Ex. L at 97-101. The company is now losing approximately \$4 to \$5 million per year. Id. at 101.

12. Some of this loss was anticipated by the CEO, Mr. Zadeh, although in retrospect those estimates were low.

1 Id. at 95; Bacon's Article at 4-5. In an August 1997
2 interview, Mr. Zadeh, said that he planned to publish
3 the magazine six times a year at \$6.95 per issue.
4 Bacon's Article at 5. For the interview, he stated
5 that he'd be happy losing \$500,000 a year, but that he
6 felt he could expect to break even with a few issues.
7 Id. At the time, he felt that the magazine would begin
8 attracting advertisers when circulation reached 150,000
9 to 200,000 copies. Id.

10
11 13. Perfect 10 lost an estimated \$700,000 per issue for
12 the two issues it published in 1997. Jenal Decl., Ex. L
13 at 99. In 1998, Perfect 10 published four issues and
14 estimates losses around \$500,000 per issue. Id. at 100.

15
16
17 14. In addition to its website and magazine, Perfect 10
18 has also produced calendars and model of the year
19 videotapes. Id. at 101.

20
21 **Age Verification Services**

22
23 15. The online-pornographic industry faces the constant
24 threat of litigation and regulation stemming from
25 a variety of fears, including access by under-age
26 users and violations of obscenity laws, including those
27
28

1 against child pornography, bestiality and other such
2 subjects that the government identifies and chooses
3 to regulate. See, e.g., Lane Decl. ¶¶ 25, 44.
4

5 16. Age verification services ("AVS") are meant to
6 provide some level of reassurance to all involved.
7

8 17. An AVS places a computer script on individual webpages
9 or websites. Farmer Decl., ¶ 15. When a visitor hits
10 a page containing the script, it provides a prompt
11 before allowing the visitor to view the page or other
12 pages on the site. Id. AVS services sell passwords to
13 consumers so they can gain access to materials on
14 participating websites. Lane Decl., ¶ 47; Farmer Decl.,
15 ¶ 13.
16

17 18. Although not a perfect screen, the credit card is
18 a relatively strong proxy for identifying those who
19 are 18 or older. Lane Decl., ¶ 46.
20

21 **AVS and Credit Card Billing**

22

23 19. The growth of the online-pornographic business has
24 been a boon to credit card companies. Lane Decl. ¶ 32.
25 At the same time, credit card companies have had
26 problems with a phenomenon called chargebacks as they
27
28

1 relate to online adult businesses. Id. ¶¶ 51, 52.

2
3 20. Chargebacks are requests for reversals of credit card
4 charges and are often tied to customer complaints. Id.
5 ¶ 51. Mastercard and Visa have established strict
6 limits on the percentages of chargebacks they will
7 tolerate from any one account. Id. ¶ 52. Merchants
8 exceeding those limits are heavily fined and may
9 lose their merchant processing accounts. Id.
10

11 **Cybernet Ventures, Inc.**
12

13 21. Cybernet Ventures, Inc. ("Cybernet") runs an
14 AVS called "Adult Check." Lane Decl., ¶ 46. Cybernet,
15 through its Adult Check brand, bills itself as the
16 leading AVS on the Internet. Id. ¶ 48. Adult Check
17 claims to have approximately 300,000 "regular" sites
18 and 14,000 "Gold" sites using its service. Umbreit
19 Decl., ¶ 24.
20

21 22. Based on Adult Check's image requirements, it estimates
22 that there are over 20 million images available on
23 participating web sites. Id. On an average day,
24 Cybernet authenticates an average of 1.9 million Adult
25 Check IDs. Id. ¶ 12.
26
27
28

Adult Check's Internal Organization

23. Individual "webmasters" run the websites that make up the Adult Check "network."⁷ See, e.g., Lane Decl., ¶ 58. These webmasters are not charged to use the Adult Check service. Umbreit Decl., ¶ 7.

24. Each webmaster is responsible for running the website, including creating the site's content, finding a server to host the site and other technical details, as well as promoting the site. Lane Decl., ¶¶ 34-36.

25. When a new user visits one of these sites, they are directed to Cybernet's site on adultcheck.com to register with Adult Check. Farmer Decl., ¶14; Umbreit Decl. ¶¶ 9, 10.

26. Cybernet has two tiers of membership available, a "regular" membership and an "Adult Check Gold" membership. See, e.g., Umbreit ¶ 24. For \$19.95 every three months, a regular member receives access to all sites using the AVS, except for the Gold sites. Zadeh Decl., Ex. 1 at 2. The Gold sites contain more images, more diversity, and generally meet more criteria

⁷"Webmasters" are the operators of the individual websites that can be accessed using an Adult Check ID.

1 aimed at ensuring these sites are higher-quality than
2 those available to "regular" members. See, e.g., Zadeh
3 Decl., Ex. 1 at 19-20 (contrasting requirements);
4 Umbreit Decl., ¶ 22. The Gold memberships are more
5 expensive and provide access to all the websites
6 classified as Adult Check Gold (approximately 14,000
7 sites) for a price of \$19.95 per month. Zadeh Decl.,
8 Ex. 4.

9
10 27. All fees paid by these members go directly to Cybernet.
11 On a semi-monthly basis Cybernet then pays each
12 individual webmaster a commission attributed to the
13 site where the member originally signed up for his or
14 her Adult Check membership. Umbreit Decl., ¶ 13; Zadeh
15 Decl., Ex. 1 at 8-10.

16
17 28. There are two main factors driving an AVS service's
18 success, the quantity of images available on the
19 participating websites and their quality. See Lane
20 Decl., ¶ 54; Umbreit Decl. ¶ 22. There is also a
21 need to prevent a redundancy of similar sites because
22 this dilutes the experience of viewers, increasing
23 dissatisfaction with a service and increasing the
24 likelihood of users leaving the service or requesting
25 chargebacks. Lane Decl., ¶ 57; Zadeh Decl., Ex. 1 at
26 21.

1 29. Adult Check has a financial incentive to insure
2 that the participating websites are numerous, somewhat
3 distinctive and contain images that attract users. As
4 a result Adult Check has adopted a variety of
5 guidelines concerning the content provided by the
6 websites using its name and services. Zadeh Decl, Ex.
7 1 at 15-24.

8
9 30. Adult Check has divided up its websites into six tiers.
10 They are as follows:

11
12 Tier 1. Adult Check exclusive sites with only Adult Check
13 ads or no ads at all;

14 Tier 2. Adult Check exclusive sites with both Adult Check
15 ads and non-Adult Check ads;

16 Tier 3. Adult Check Exclusive sites with non-Adult Check
17 ads.

18 Tier 4. Non-exclusive sites with only Adult Check ads
19 or no adds ad all;

20 Tier 5. Non-exclusive sites with both Adult Check ads
21 and non-Adult Check ads;

22 Tier 6. Non-exclusive sites with non-Adult Check ads.
23

24 Each tier involves greater value for users along a
25 spectrum defined by greater commitment to the Adult
26 Check brand.
27

1
2 See Zadeh Decl., Ex. 1 at 16.

3
4 31. Cybernet views sites and assigns keywords to further
5 efficiency of an internal search engine that it
6 provides as a service to consumers. Zadeh Decl., Ex. 12
7 at 63.

8
9 32. Part of Cybernet's Adult Check service is a linking
10 service found on adultcheck.com. Cybernet provides
11 links to various webpages organized by category,
12 including categories devoted to celebrity sites.
13 See, e.g., Zadeh Decl., Exs. 72 & 81.

14
15 33. Adult Check also provides a search function that
16 searches for content within the Adult Check affiliated
17 websites and webpages. Umbreit Decl., ¶ 17.

18
19
20 **Adult Check Policies**

21
22 34. Adult Check has also endorsed a number of "General
23 Policies," including:

24
25 1) Any unlawful activities or activities that, within
26 the sole and absolute discretion of Adult Check may be
27

1 or are harmful to its reputation, image, goodwill
2 (including but not limited to inappropriate Usenet
3 postings or spamming) will result in immediate
4 termination;

5
6 2) Illegal content is strictly prohibited. Illegal content
7 includes, but is not limited to: minors, rape and
8 bestiality;

9
10 3) Fraud, illegal activities, unfair or deceptive trade
11 practices or violation of the Adult Check Policies will
12 result in immediate termination of your account; and

13
14 4) Violation of the Adult Check limited use license of
15 trademarks and copyrighted materials is prohibited.
16

17 Zadeh Decl., Ex. 1 at 13.
18

19 35. Adult Check also has a policy related to its Links
20 Page, which leads Adult Check users to various sites
21 and webpages by providing a directory organized by
22 category. In order to be listed on the Links Pages:
23

24 1) A site may not display, publish, link to or provide
25 access to any images, pictures, stories, video clips
26 or any other media portraying any content that is deemed
27
28

1 illegal in the United States. Any site containing content
2 deemed illegal in the United States will be removed from
3 the Links Page and the account will be deactivated;

4
5 2) Each Adult Check Site must contain unique, quality and
6 adequate content. The quality, uniqueness and adequacy of
7 the content is solely within the discretion of AC, but
8 generally means at least 30 pictures of sufficient
9 quality to provide value to the Adult Check customer.
10 These guidelines are loose and subjective to insure that
11 there is a definite benefit for the Adult Check customers
12 without requiring them to pay extra fees;

13
14 3) A participating site must be placed in the appropriate
15 category of the Links Pages and the description of the
16 site must be accurate. Any deceptive information is
17 grounds for removing the site from the Links Page.

18
19 4) Site names and site descriptions must not be false,
20 misleading or deceptive.

21
22 5) Multiple sites owned by the same person or entity must
23 be designed as individual sites and may not be listed
24 more than once.

25
26 6) Feeder sites, must also comply with the minimal
27
28

standards.

7) Membership sites, requiring further membership fees must provide content before an Adult Check customer is required to pay any fees.

8) The webmaster is responsible for providing all content. Cybernet disclaims any responsibility for content.

9) All sites are reviewed and monitored for continued compliance.

10) Each site submitted must be unique. Templated sites will not be accepted for placement on the links page. Templated sites are defined as two or more sites that are created or appear to the viewer as substantially identical, despite minor variations such as site title.

11) The use of any registered trademark, trade name, copyright or exclusive publicity right without proper authority or written consent of the owner, will not be permitted on any Adult Check site. violation of this policy will, among other things, result in the removal of the violating site from the Links pages and the termination of the website's affiliation with Adult Check.

1 Zadeh Decl., Ex. 1 at 15, 16.

2
3 36. Adult Check also has a Child Pornography policy. Adult
4 Check classifies its Child Pornography policy as "zero
5 tolerance." This policy is enforced anywhere images,
6 words or inferences relating to child pornography are
7 used in conjunction with the Adult Check system. Adult
8 Check explicitly states: "This is **not** limited to sites
9 linked to from our links pages," thus implying it
10 applies to all content accessed through the use of
11 Adult Check passwords. When this policy is violated,
12 the site will be closed, removed from the Adult Check
13 system without warning, the limited use license for the
14 Adult Check script will be revoked and the offender
15 must remove all links and references to Adult Check
16 from the offender's sites, presumably going beyond the
17 single webpage or site where the offending material
18 appears. Zadeh Decl., Ex. 1 at 14, 15 (emphasis added
19 to quote).

20
21 37. Prior to August 8, 2001, Cybernet's policy on
22 copyright and trademark violations was self-
23 characterized as "neutral." In an email, one
24 employee put it this way:

25
26 If Webmaster A contacts us and says that Webmaster B is
27
28

1 violating his or her copyrights or trademarks we will
2 do one thing and one thing only. Adult Check will
3 forward an email from Webmaster A to Webmaster B. It is
4 then Webmaster B's responsibility to reply to Webmaster
5 A and solve the matter.

6
7 It would never be a good idea for Adult Check to take
8 any other stance in these matters. Doing so would open
9 a huge amount of legal liability due to the possibility
10 of error. Webmaster A could be lying and Webmaster B
11 could have designed the site first and it could have
12 actually been Webmaster A who copied it! This is why we
13 stay neutral.

14
15
16 Zadeh Decl., Ex. 20 at 240; see also Mausner Decl., Ex. C at
17 97.

18
19 38. Since August 8, 2001, Cybernet has promulgated a
20 copyright policy labeled "Digital Millennium Copyright
21 Act ("DMCA") policy". Under this policy, a notice of
22 infringement sent to Cybernet must include:

- 23
24 1) A physical or electronic signature of the owner or a
25 person authorized to act on behalf of the owner;
26
27
28

- 2) An identification of the copyrighted work and if it is located on a web page, the specific address of the web page should be provided;
- 3) ID of the material that is claimed to be infringing or the subject of infringing activity;
- 4) statement of good faith belief that use of the material is not authorized by the copyright owner, its agent or the law;

According to Cybernet's "DMCA Policy", upon receipt of a written notification meeting all of its criteria, Cybernet will:

- 1) Act expeditiously to remove links or disable access to the allegedly infringing material;
- 2) Take reasonable steps to promptly notify the accused subscriber; and
- 3) forward a copy of the written notification to the accused subscriber.

This policy then provides for a counter notification procedure to be used by webmasters accused of infringement.

1 Finally, "in appropriate circumstances where [Cybernet]
2 receives multiple notices, subscribers to [its] age
3 verification services will be terminated."

4
5 Zadeh Decl., Ex. 1 at 21-24.

6
7 39. There is no credible evidence that Cybernet actively
8 enforces its "DMCA policy." Rather there is evidence
9 that four months after the policy became effective and
10 well after this action had begun, clearly infringing
11 pictures were on websites identified by Perfect 10
12 in its Second Amended Complaint, see Zadeh Decl., Ex.
13 76, as well as blatantly infringing pictures on sites
14 listed in the Third Amended Complaint, see Zadeh
15 Decl., Ex. 31.

16
17 **Conduct by Adult Check Affiliated Websites**

18
19 40. Sites affiliated with Adult Check have engaged in
20 a range of conduct, of which a representative sample
21 includes:

22
23 41. On August 6, 2001, a website affiliated with
24 Adult Check, named FemCelebs and located at
25 animald.com, contained identical copies of at
26 least three Perfect 10 magazine covers. Zadeh Decl.,
27
28

1 Ex. 8. Perfect 10 was assigned rights of publicity by
2 the pictured models. Zadeh Decl., Ex. 117
3

4 42. On December 19, 2001, another Adult Check
5 affiliated website, Celebrities Online, located at
6 www.celebs-online.com, displayed identical copies
7 of several photographs containing pictures derived
8 from the Perfect 10 magazine and Perfect 10's website.
9 The pictured model had assigned her rights of
10 publicity to Perfect 10. Several of the pictures
11 contained the words Perfect 10 as well as a Perfect
12 10 copyright notice. Zadeh Decl., Ex. 31.
13

14 43. On December 20, 2001, another site affiliated
15 with Adult Check, Before & After, located at
16 joebosco.com, displayed identical pictures
17 derived from Perfect 10's magazine and containing
18 models who had assigned their rights of publicity to
19 Perfect 10. Zadeh Decl., Ex. 38.
20

21 44. On December 22, 2001, fredd38.com, part of the
22 websites owned by defendants FTV, ftv.net, Vic Toria,
23 and AEI Productions (collectively, "the FTV
24 defendants"), and affiliated with Adult Check,
25 displayed a picture purporting to be Christina Aguilera
26 posing topless, but actually contained a photograph of
27
28

1 a Perfect 10 model found on its website, altered by
2 adding Ms. Aguilera's head. Zadeh Decl., Ex. 46. This
3 model had assigned her rights of publicity to Perfect
4 10.

5
6 45. On December 11, 2001, the website located at
7 celeblust.com, also owned by the FTV defendants
8 displayed a picture purporting to be a topless Faith
9 Hill, but actually contained a digitally altered
10 image of a Perfect 10 model. Zadeh Decl., Ex. 57
11

12 46. These examples are not isolated and Perfect 10 has
13 found more than 10,000 copies of Perfect 10 images
14 on approximately 900 websites affiliated with Adult
15 Check.⁸ Zadeh Decl., ¶ 46.
16

17 **Defaults Entered**
18

19 47. Sean Devine has had a default entered against
20 him based on Perfect 10 images and models displayed
21 on the website BabesofBabylon.com. See Zadeh Decl., Ex.
22 115.
23

24 48. Default has been entered against defendants Funet, Inc.
25

26 ⁸The Court finds Mr. Zadeh's testimony on this count to be
27 credible and Cybernet has advanced no information to dispute it.
28

1 and AEI Productions, Inc., supported by Zadeh Decl.,
2 Ex. 116 & Ex. 114.

3
4 **Extent of Problematic Images and Sites**

5
6 49. A significant number of the images found on websites
7 affiliated with Adult Check consist of images:

- 8
9 1) containing celebrities who have not consented to
10 the use of such images;
11 2) contain the heads of celebrities superimposed on
12 other models, including Perfect 10 models;
13 3) identical to those protected by Perfect 10's
14 copyrights;
15 4) displaying Perfect 10's trademarks;
16 5) displaying copies of Perfect 10's images with
17 another identifying mark placed on the image; and
18 6) containing images of models who have assigned
19 their rights of publicity to Perfect 10.
20

21 50. Celebrity websites make up approximately 4,000 of the
22 314,000 websites affiliated with Adult Check. They may
23 make up as many as 2,000,000 of the images found on
24 the Adult Check affiliated sites. Umbreit Decl. ¶ 19.
25

26 51. Some of these websites identify themselves as "fake."
27
28

1 Zadeh Decl., Ex. 107.

2
3 52. Some of these websites portray graphic scenes
4 and create the impression that the celebrities
5 mentioned are affiliated with the action presented.

6
7 53. Cybernet chooses which websites are placed in the
8 celebrity category.

9
10 **Notice to Cybernet of Problems on Affiliated Sites**

11
12 54. Cybernet was provided with notice of 18 celebrities
13 that objected to usage of their identities and/or
14 images on Adult Check affiliated sites back in November
15 27, 2000. Zadeh Reply Decl. ("Zadeh Decl. II"), Ex. 19
16 at 267.⁹

17
18 55. On January 7, 2002, Perfect 10 provided a number of
19 declarations to the Court from celebrities, generally
20 providing:

21
22 I have not licensed any pornographic website or any
23

24 ⁹The Court utilizes this evidence because it is consistent
25 with a declaration submitted by Lin Milano to the Court in August
26 22, 2001. That declaration provides evidence of notice and the e-
27 mail meets Cybernet's previous objection that Ms. Milano's
28 declaration does not meet the best evidence rule. See Evid. Obj.
to Decl. of Lin Milano, filed Aug. 23, 2001.

1 affiliate of such website to sue or exploit my name,
2 likeness or identity. In general, I do not want any
3 entity to use or exploit my name, likeness or
4 identity, without my express written permission, or
5 the permission of my manager or someone with the
6 authority to act on my behalf.

7
8 Aguilera Decl.

9
10 56. In order for a site to be accepted into the Adult
11 Check system, Cybernet reviews the site. Zadeh Decl.,
12 Ex. 30 at 287a.

13
14 57. Among the considerations in reviewing these sites,
15 Cybernet looks for potentially underage images and
16 overuse of celebrity images. Id. at 287b

17
18 58. On February 27, 2001, three months after a group of
19 celebrities provided Adult Check with direct notice
20 that use of their images was not allowed, an Adult
21 Check employee refused to accept a site because, among
22 other reasons:

23
24 Please make sure that your site does not have any
25 of the following models in its principal content [incl.
26 models listed in request]. . . . This content cannot
27

1 be allowed since it would continue to oversaturate our
2 links page.

3
4 Zadeh Decl., Ex. 30 at 287b.

5
6 59. Generally, Cybernet considers an image to be
7 oversaturated if it appears 7 to 10 times. Id., Ex. 1
8 at 21; Ex. 30 at 287b.

9
10 60. Cybernet has a staff of twelve that reviews sites
11 when they initially join Adult Check, with a goal
12 of doing monthly reviews, and the staff also does
13 spot checking. Mausner Decl., Ex. C at 102, 114.

14
15 61. Cybernet actively reviews and directs affiliated
16 webmasters on the appearance and content of their
17 sites. Zadeh Decl., Ex. 30.

18
19 62. Cybernet provides Adult Check webmasters with a variety
20 of tools to help them develop their websites. See,
21 e.g., Zadeh Decl., Exs. 1, 18.

22
23 63. Adult Check's Knowledge Base does not discuss
24 protection of copyrights, trademarks or publicity
25 rights. See Zadeh Decl., Ex. 18.

1 IV. CONCLUSIONS OF LAW

- 2
- 3 1. There is not a serious question on the merits
- 4 concerning Cybernet's liability for direct copyright
- 5 infringement of Perfect 10's copyrights.
- 6
- 7 2. There is a strong likelihood of success for Perfect
- 8 10's contributory copyright infringement claims against
- 9 Cybernet.
- 10
- 11 3. There is a strong likelihood of success for Perfect
- 12 10's vicarious copyright infringement claims against
- 13 Cybernet.
- 14
- 15 4. There is a substantial question whether or not
- 16 Cybernet is a provider of online services under the
- 17 Digital Millennium Copyright Act ("DMCA").
- 18
- 19 5. If Cybernet qualifies as an online service
- 20 provider under the DMCA there is little likelihood
- 21 that any DMCA "safe harbor" will apply.
- 22
- 23 6. There is not a strong likelihood of success on
- 24 Perfect 10's direct liability claims against Cybernet
- 25 for violating the models' publicity rights assigned to
- 26 Perfect 10.
- 27
- 28

1 7. There is a strong likelihood of success on Perfect
2 10's claims of aiding and abetting liability for
3 Cybernet's role in the violations of the publicity
4 rights assigned to Perfect 10.

5
6 8. Perfect 10 has standing to assert as an unfair
7 business practice the abuse of publicity rights
8 for those persons who have provided Cybernet with
9 actual notice that use of their images is not
10 authorized.

11
12 9. There is a strong likelihood of success on Perfect 10's
13 claim that Cybernet has violated California's unfair
14 business practices act by violating the rights of
15 publicity for those persons who have provided Cybernet
16 with actual notice that use of their images is not
17 authorized.

18
19 10. There is not a strong likelihood of success on Perfect
20 10's claims that Cybernet is liable for contributory
21 trademark infringement of Perfect 10's trademark
22 rights.

23
24 11. Cybernet has not made a good faith effort to root out
25 illegal conduct among its webmasters and gains
26 direct financial gains as a result.

1 11. Cybernet is a competitor of Perfect 10's.

2
3 12. There is a strong likelihood that Perfect 10 will
4 prevail on its claim that Cybernet's practices are
5 "unfair" under the unfair business practices act.
6

7 13. The unclean hands and laches doctrines are not
8 applicable to this motion.
9

10 14. Harm is presumed for unfair competition, violations
11 of copyright, and for trademark infringement.
12

13 15. Perfect 10 has shown a strong likelihood that it will
14 suffer irreparable harm if the unfair business
15 practices, copyright violations, and trademark
16 violations are not enjoined.
17

18 16. Enjoining these practices is consistent with the public
19 interest.
20

21 17. Enjoining these practices will not result in an
22 inequitable burden on Cybernet.
23

24 18. The balance of hardships tips in favor of Perfect 10.
25

26 **V. PRELIMINARY INJUNCTION STANDARDS**
27
28

1 In the Ninth Circuit, two interrelated tests exist for
2 determining the propriety of the issuance of a preliminary
3 injunction. Under the first test, the Court may not issue a
4 preliminary injunction unless: (1) the moving party has
5 established a strong likelihood of success on the merits; (2) the
6 moving party will suffer irreparable injury and has no adequate
7 remedy at law if injunctive relief is not granted; (3) the
8 balance of hardships tips in favor of the movant; and (4)
9 granting the injunction is in the public interest. See Martin
10 Int'l Olympic Comm., 740 F.2d 670, 674-75 (1984); Greene v.
11 Bowen, 639 F. Supp. 554, 558 (E.D. Cal. 1986). Under the
12 alternative test, a plaintiff must show either (1) a combination
13 of probable success on the merits and the possibility of
14 irreparable injury; or (2) that a serious question exists going
15 to the merits and that the balance of hardships tip sharply in
16 the plaintiff's favor. See First Brands Corp. v. Fred Meyer,
17 Inc., 809 F.2d 1378, 1381 (9th Cir. 1987).

18 The two tests represent "a continuum of equitable discretion
19 whereby the greater the relative hardship to the moving party,
20 the less probability of success must be shown." Regents of Univ.
21 of Calif. v. ABC, Inc., 747 F.2d 511, 515 (9th Cir. 1984). See
22 also Benda v. Grand Lodge of Int'l Ass'n of Machinists, 584 F.2d
23 308, 315 (9th Cir. 1978).

24 VI. LIKELIHOOD OF SUCCESS

25 A. COPYRIGHT INFRINGEMENT

26 1. Direct Infringement

27
28

1 To prove copyright infringement, a plaintiff must prove two
2 elements: (1) ownership of a valid copyright, and (2) copying of
3 protectable expression by the defendant. Baxter v. MCA, Inc., 812
4 F.2d 421, 423 (9th Cir. 1987). Infringement occurs when a
5 defendant violates one of the exclusive rights of the copyright
6 holder. 17 U.S.C. § 501(a). Direct infringement does not require
7 intent or any particular state of mind, although willfulness is
8 relevant to the award of statutory damages. 17 U.S.C. § 504(c).

9 **a. Does Perfect 10's Registered Copyright**

10 **In Its Magazines Cover The Individual Pictures**

11 **Involved Here?**

12 Cybernet's first line of defense is to challenge the
13 adequacy of Perfect 10's showing of copyright protection for its
14 claimed images. Opp'n at 18. Cybernet contends that the copyright
15 registrations produced in this motion involve collective works,
16 the Perfect 10 magazines and the Internet site, but the
17 registrations do not establish copyrights in the individual
18 pictures. Opp'n at 18. Cybernet's only authority is a quote to 15
19 U.S.C. § 103(b) which provides:

20
21 The copyright in a compilations or derivative work
22 extends only to the material contributed by the author
23 of such work and distinguished from the preexisting
24 material employed in the work and does not imply an
25 exclusive right in the preexisting material. The
26 copyright in such work is independent of, and does not
27
28

1 alter or enlarge the scope, duration, ownership, or
2 subsistence of, any copyright protection in the
3 preexisting material.

4
5 15 U.S.C. § 103(b).

6 It is unclear exactly what Cybernet is challenging - Perfect
7 10's ability to bring suit under the Copyright Act, the scope of
8 the registrations, the entitlement to the presumption of *prima*
9 *facie* validity as to the copyright registration, or directly
10 challenging Perfect 10's claimed copyright in these images.

11 As an initial matter, where the owner of a copyright for a
12 collective work also owns the copyright for a constituent part of
13 that work, registration of the collective work is sufficient to
14 permit an infringement action under 15 U.S.C. § 411(a).¹⁰
15 Moreover, the Court finds that Perfect 10 is entitled to treat
16 the copyright registrations as *prima facie* evidence that the
17 individual pictures are copyrighted. See Autoskill, Inc. v.
18 National Educ. Support Sys., Inc., 994 F.2d 1476, 1487-88 (10th
19 Cir. 1993), disagreed with on other grounds, Parker v. Bain, 68
20 F.3d 1131, 1136 n.8 (9th Cir. 1995); cf. 17 U.S.C. § 404 (similar
21 principle with regard to reach of copyright notice in collective
22

23
24 ¹⁰Morris v. Business Concepts, Inc., 259 F.3d 65, 68 (2d
25 Cir. 2001); see also 37 C.F.R. 202.3(b)(3)(2001) ("the following
26 shall be considered a single work: . . . all copyrightable
27 elements that are otherwise recognizable as self-contained works,
that are included in a single unit of publication and in which
the copyright claimant is the same."); Hilliard v. Mac's Place,
Inc., 1994 WL 323961 *1 (W.D. Wash. 1994).

work). Perfect 10's copyright registrations for the magazine issues indicate that they are collective works where contributions to the work were works "made for hire." See, e.g., Mausner Decl., Ex. A at 9. The website registration recognizes that the two-dimensional text and photographs on the site include contributions made for hire and incorporate photographs published in the Perfect 10 magazine. *Id.* at 7-8. The Court concludes this is sufficient to raise the presumption of validity, particularly where Cybernet has made no sustained argument to the contrary.¹¹ Perfect 10 has shown a strong likelihood that it owns a valid copyright in the asserted images.

**b. Has Cybernet Violated Any of Perfect 10's Rights
Under the Copyright Act?**

Cybernet's other argument fares better. Cybernet contends

¹¹The Court finds the case of Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc., 777 F.2d 485, 490 (9th Cir. 1985) *abrogated on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), distinguishable. There the Ninth Circuit refused to allow the plaintiff to use the presumption of validity to defeat the district court's finding that preexisting works did not bear a copyright notice. *Id.* This result was consistent with the discretion afforded a district court in considering the evidentiary weight to be accorded a certificate of registration, see 17 U.S.C. § 410(c). Additionally, evidence was brought in contradicting the presumption of validity and it was conceded the copyright covered a derivative work. 777 F.2d at 489-90. Cybernet has not made an argument to establish similar points, nor addressed the Court's discretion under § 410(c). In this case, the Court will therefore favor the presumption of validity over Cybernet's attempt to reverse this presumption for collective works by assuming that they are merely derivative works. Although Perfect 10 refers to the registered works as a "compilation" in its Reply, see Reply at 15, the Court notes that the certificates claim to cover "collective works."

1 that it cannot be held directly liable for any copyright
2 infringement carried out by its affiliated websites because "no
3 infringing files exist on any computer equipment owned by
4 Cybernet." Opp'n at 19. Perfect 10 does not address this argument
5 in its reply papers and the Court finds that there is little
6 likelihood of success on this claim. Assuming that websites on
7 the Adult Check system infringe Perfect 10's copyrights, there is
8 no evidence that Cybernet owns any of these websites or otherwise
9 engages in directly infringing activity in the classic sense.

10 There might exist another route to direct liability,
11 however. Computer technology, and in particular the Internet, has
12 created a challenge to copyright's strict liability scheme.
13 Because of the architecture of the web and the workings of
14 computer technology, almost any business that utilizes computer
15 hardware to create access to the Internet or to store content may
16 find its hardware creating or displaying infringing material as a
17 result of decisions by third-parties (the system's users) without
18 the business doing any truly volitional actions.

19 Religious Technology Center v. Netcom On-line Comm. Servs.,
20 Inc., 907 F. Supp. 1361 (N.D. Cal. 1995), illustrates this point
21 vividly. In Religious Technology, a disgruntled former Church of
22 Scientology member was accused of posting copyrighted works on
23 the Internet. Id. at 1365-66. This member used a bulletin board
24 service (BBS) to gain access to the Internet, and the BBS in turn
25 used the facilities of Netcom to provide this access. Id. at
26 1366. When the initial defendant sent his postings to the
27
28

1 Internet, the information was automatically stored briefly on the
2 BBS's computer and then automatically copied on Netcom's
3 computer. Id. at 1367. Once on Netcom's computers, the messages
4 were then available to Netcom's users and eventually to all users
5 that participated in a service called Usenet. Id. at 1367-68.

6 The Ninth Circuit in a previous case, MAI Systems Corp. v.
7 Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993) had upheld
8 a finding of copyright infringement where a repair person who was
9 not authorized to use a computer owner's licensed operating
10 system software had merely turned on the computer.¹² The relevant
11 copying in MAI Systems was the loading of the operating system
12 into the computer's memory long enough to check an "error log."
13 991 F. 2d at 518. Similarly, in Religious Technology, the
14 existence of the messages on the system were "sufficiently
15 'fixed' to constitute recognizable copies under the Copyright
16 Act." 907 F. Supp. at 1368.

17 Nevertheless, the Religious Technology court found Netcom
18 was not liable for direct copyright infringement. Id. at 1372-73.
19 First the court noted that Netcom had not initiated the copying.
20 Id. at 1368. The court then analogized Netcom's creation of a
21 system that automatically and uniformly creates temporary copies
22 of all data through it to a copying machine. Id. at 1369. The
23 court rejected the possibility that such actions could violate
24 the exclusive right to reproduce a work absent some further
25

26 ¹²But see 17 U.S.C. § 117 (limiting reach of exclusive
27 rights in precisely this situation).

1 element of volition or causation, relying on the unreasonable
2 liability such a regime would create. Id.

3 Similarly, the Netcom court rejected the argument that the
4 storage of the works on Netcom's system for up to eleven days
5 violated the plaintiffs' right to publicly distribute and display
6 their works. Id. at 1371-72. The court found that there was the
7 same causation and volition problems that infected the
8 reproduction claim. Id. at 1372. The actions of the BBS provider
9 were automatic and indiscriminate. Id. Moreover, the court
10 pointed to the fact that Netcom did not maintain an archive of
11 files for its users, thus it could not be said to be supplying a
12 product to users. Id. This contrasted with some of its
13 competitors that created or controlled content available to their
14 subscribers. Id. The failure to establish violation of the
15 plaintiffs' reproduction, distribution or display rights by
16 Netcom thus defeated plaintiffs' direct infringement theory. See
17 id. at 1370, 1373.

18 Following the Religious Technology decision, another
19 district court found that a BBS operator that knew about
20 copyright infringement on its service and encouraged others to
21 upload infringing products onto his service could not be held
22 liable on a direct infringement theory. See Sega Enterprises,
23 Ltd. v. MAPHIA, 948 F. Supp. 923, 931 (N.D. Cal. 1996). This was
24 so because the activity charged had no bearing on whether the BBS
25 operator "directly caused" the copying to occur. Id.

26 Finally, in Playboy Enterprises, Inc. v. Russ Hardenburgh,
27
28

1 Inc., 982 F. Supp. 503, 512 (N.D. Ohio 1997), a district court
2 found direct infringement despite its agreement with the
3 rationale of Religious Technology. The Hardenburgh court stressed
4 that a direct infringer must "actually engage" in one of the
5 activities reserved to copyright owners. Id. In Hardenburgh, the
6 court found that the defendant BBS providers engaged in two of
7 the activities exclusively reserved for copyright owners. Id. at
8 513.

9 First, the court found the defendants had distributed and
10 displayed copies of Playboy photographs. Id. This finding hinged
11 on the defendant's policy of encouraging subscribers to upload
12 files onto its system, viewing the files in the upload file, and
13 then moving the uploaded files into files generally available to
14 subscribers. Id. This transformed the defendants from passive
15 providers of a space to active participants in the process of
16 copyright infringement. The moving of the files, accomplished by
17 employees constituted the distribution, and the display of those
18 copies after the BBS's employees placed the files there violated
19 the right of display. Id.

20 The principle distilled from these cases is a requirement
21 that defendants must actively engage in one of the activities
22 recognized in the Copyright Act.¹³ Based on the evidence before
23 the Court it appears that Cybernet does not use its hardware to
24

25 ¹³See also Kelly v. Arriba Software Corp., 280 F.3d 934, 946
26 (9th Cir. 2002) (holding company that designed search engine,
27 which trolled web, found images and then inline linked and framed
28 those images on its sites, was liable for direct infringement).

1 either store the infringing images or move them from one location
2 to another for display. This technical separation between its
3 facilities and those of its webmasters prevents Cybernet from
4 engaging in reproduction or distribution, and makes it doubtful
5 that Cybernet publicly displays the works. Further, there is
6 currently no evidence that Cybernet has prepared works based upon
7 Perfect 10's copyrighted material. The Court therefore concludes
8 that there is little likelihood that Perfect 10 will succeed on
9 its direct infringement theory.

10 2. Contributory Infringement

11 Liability for contributory copyright infringement attaches
12 when "one who, with knowledge of the infringing activity,
13 induces, causes or materially contributes to the infringing
14 conduct of another." A&M Records, Inc. v. Napster, Inc., 239 F.3d
15 1004, 1019 (9th Cir. 2001) ("Napster II"). Put differently,
16 liability exists if the defendant engages in personal conduct
17 that encourages or assists the infringement. Id. The standard for
18 the knowledge requirement is objective, and is satisfied where
19 the defendant knows or has reason to know of the infringing
20 activity. Gershwin Publishing Corp. v. Columbia Artists Mgmt.,
21 Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).

22 a. Cybernet's Knowledge

23 Cybernet's only argument against Perfect 10's contributory
24 infringement theory is that Cybernet lacks the requisite
25 knowledge to be held liable. Opp'n at 20. Cybernet relies heavily
26 on Perfect 10's failure to contact Cybernet with its claims
27
28

1 before beginning the present litigation. Id. According to
2 Cybernet, although it employs twelve site reviewers, even if they
3 had seen Perfect 10 copyright notices on various sites, they
4 would not necessarily know Perfect 10's copyrights were infringed
5 because they might be licensed. Id. at 20-21.

6 In contrast, there is evidence that Steven Easton of the
7 Association for the Protection of Internet Copyright contacted
8 Cybernet with approximately 2,000 e-mails, beginning in 1996 or
9 1997, notifying Cybernet of alleged copyright infringement on its
10 system.¹⁴ Easton Decl. ¶ 2. Perfect 10 has also brought forward
11 evidence that Cybernet was notified of generic potential
12 copyright infringement by users in 2001. Zadeh Decl., Ex. 102.
13 Additionally, Cybernet's site reviewers review every site before
14 allowing the sites to utilize the Adult Check system, and attempt
15 to review other sites monthly. Mausner Decl., Ex. C at 102, 114;
16 Zadeh Decl., Ex. 30. Although they might not detect every
17

18 ¹⁴This declaration is being used for the limited purpose as
19 evidence of notice. The Court finds the declaration credible and
20 interprets Mr. Easton's claim that he began notifying Cybernet of
21 "violations of copyright under the DMCA" in 1996 or 1997, to be
22 a claim that he began notifying Cybernet of alleged copyright
23 violations at that time. The Court pauses to reflect on
24 Cybernet's earlier objection to this declaration because [it] "is
25 simply making prejudicial and defamatory allegations against
26 Cybernet, which can no longer be permitted, let alone as evidence
27 for this Court to consider," Evid. Obj. to Portions of Decls.,
28 filed December 17, 2001, in light of Cybernet's current evidence
that "many of the notices sent by Steven Easton were deficient
and thus, Cybernet *could* not act on them." Umbreit Decl. ¶ 26
(emphasis added). This is just another instance where Cybernet's
prior invective undercuts its claims to be honestly working to
address potential problems with its affiliated sites.

1 | copyright violation, there is evidence that many sites contain
2 | disclaimers to the effect, "we do not hold copyrights for these
3 | works." Farmer Depo. at 121:19-21. Finally, Perfect 10's Second
4 | Amended Complaint, filed on June 15, 2001, contained notice of
5 | Perfect 10's allegations concerning potential infringement on 77
6 | different websites.

7 |
8 | This evidence of notice compares favorably with the
9 | allegations of notice in Fonovisa, Inc. v. Cherry Auction, Inc.,
10 | 76 F.3d 259 (9th Cir. 1996). In Fonovisa, the Fresno County
11 | Sheriff's Department seized 38,000 counterfeit tapes (copyright
12 | holders unstated) from a swap meet approximately a year and a
13 | half before the plaintiff filed suit. See Fonovisa, Inc. v.
14 | Cherry Auction, Inc., 847 F. Supp. 1492, 1494 (E.D. Cal. 1994)
15 | rev'd 76 F.3d 259 (9th Cir. 1996) ("Fonovisa I"). Additionally,
16 | the swap meet had received a letter six months before the suit
17 | from a police officer who "observed that several casual vendors
18 | of Latin audio music tapes had abandoned their booths upon his
19 | arrival." Id. at 1494. Finally, three months before the suit an
20 | investigator for the plaintiff witnessed infringing sales of
21 | counterfeit goods. Id. After the First Amended Complaint was
22 | served, investigators then revisited the swap meet where they
23 | found many vendors selling "counterfeits at tellingly low
24 | prices." Id. at 1495. On appeal from the district court's
25 | dismissal of the claim, the Ninth Circuit stated "There is no
26 | question that plaintiff adequately alleged the element of
27 |
28 |

1 knowledge in this case." Fonovisa, 76 F.3d at 264.

2 Perfect 10 has raised at least a serious question on the
3 issue of knowledge. The Court finds that there is a strong
4 likelihood of success in proving general knowledge of copyright
5 infringement prior to Perfect 10's filing of the complaint. There
6 are also serious questions as to Cybernet's constructive
7 knowledge of infringement of Perfect 10's copyrights prior to the
8 complaint raised by this general knowledge, Cybernet's review of
9 sites containing Perfect 10 images and the likelihood of those
10 sites containing copyright disclaimers. Further, there appears to
11 be little question that Cybernet has been provided with actual
12 notice of a large number of alleged infringements since June
13 2001.¹⁵ The Court thus finds there is a strong likelihood of
14 success that Perfect 10 will satisfy the knowledge requirement
15 for contributory liability.

16 **b. Cybernet's Material Contribution to**
17 **Infringing Activity**

18 The Court also finds that there is a strong likelihood that
19 Perfect 10 will succeed in establishing Cybernet's material
20 contributions to the infringing activity. Cybernet markets the
21 Adult Check brand through advertising, it pays webmasters
22 commissions directly based upon the number of Adult Check users
23

24 ¹⁵Neither party addressed the role of post-filing conduct,
25 but the Court notes that in Fonovisa I, 847 F. Supp. at 1495, and
26 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 918
27 (N.D. Cal. 2000) aff'd in part, rev'd in part, 239 F.3d 1004 (9th
28 Cir. 2001) ("Napster I"), the courts relied to some extent upon
allegations in the complaint and post-filing conduct.

1 that register through the site, it provides technical and content
2 advice, it reviews sites, and it attempts to control the quality
3 of the "product" it presents to consumers as a unified brand.
4 Cybernet's entire business model is premised on harnessing the
5 competitive pressures between individual webmasters into a
6 cooperative system that benefits the webmasters by increasing the
7 overall value to consumers. Cybernet's role in this system is
8 crucial, and it profits accordingly, only paying out
9 approximately 1/2 of each subscriber's payments to the
10 participating websites for each of its users, who access the
11 system close to 2 million times daily.

12 In Fonovisa the Ninth Circuit had "little difficulty" in
13 holding the allegations directed at a swap meet, where the
14 vendors were selling counterfeit goods, sufficient to show
15 material contribution. 76 F.3d at 263. As the court observed, "it
16 would be difficult for the infringing activity to take place in
17 the massive quantities alleged without the support services
18 provided by the swap meet," including the provision of space,
19 utilities, parking, advertising, plumbing and customers. Id.
20 Similarly, Cybernet's hand in Adult Check, and in particular its
21 steady payments to infringing sites along with its advertising,
22 materially contribute to the growth and proliferation of any
23 infringement. This conclusion comports with both Napster
24 decisions and with Religious Technology.¹⁶ The Court finds the

25
26 ¹⁶See Napster II, 239 F.3d at 1022 (agreeing Napster
27 provides "the site and facilities" for direct infringement
28 because without its services users could not find what they

1 evidence before it supports the conclusion that Perfect 10 has a
2 strong likelihood of establishing material contribution by
3 Cybernet to activity that infringes Perfect 10's copyrights.

4 **c. Contributory Infringement - Conclusion**

5 The Court therefore finds that there is at least a serious
6 question on the merits of Perfect 10's contributory infringement
7 claim against Cybernet prior to the filing of the present suit
8 and a strong likelihood of success on its claims stemming from
9 Cybernet's post-filing conduct.

10 **3. Vicarious Copyright Infringement**

11 Courts have extended vicarious liability in the copyright
12 context to defendants that have (1) the right and ability to
13 exercise control over a directly infringing party and its
14 activities and (2) obtained a direct financial benefit from the
15 infringing activities. Fonovisa, 76 F.3d at 262.

16 **a. Direct Financial Interest**

17 Cybernet argues that it does not have a sufficiently direct
18 financial interest to be held liable for vicarious copyright
19 infringement. Opp'n at 22-23. The Court strongly disagrees.
20 Cybernet markets the Adult Check brand based on both the number
21 of images and their quality. Zadeh Decl., Ex. 4; Lane Decl. ¶¶
22 54, 57. Perfect 10 has brought forward evidence that it has sunk
23 significant resources into developing high-quality adult images.
24 Taking Perfect 10's allegations of 10,000 infringing images at

25 _____
26 wanted with the "ease of which defendant boasts"); Napster I, 114
27 F. Supp. 2d at 919-20; Religious Technology, 907 F. Supp. at 1375
(denying defendant's motion for summary judgment on this issue).

1 face value, as Cybernet does for purposes of this test, see Opp'n
2 at 22, Cybernet benefits from the draw posed by the existence of
3 these works provided at a cost far below that provided by the
4 copyright owner. See Fonovisa, 76 F.3d at 263-64; Lane Decl. ¶
5 81; see also Napster II, 239 F.3d at 1023 ("Ample evidence
6 supports the district court's finding that Napster's future
7 revenue is directly dependent upon 'increases in user base.' More
8 users register with the Napster system as the quality and
9 quantity of available music increases.") Cybernet benefits
10 directly from these infringing sites to the extent that they have
11 brought in new users because the new customers pay Cybernet
12 directly. In addition, there is the ancillary benefit brought in
13 by the incremental additional value these sites pose to
14 consumers, who gain access to all sites by paying the Adult Check
15 membership fee. Cf. Religious Technology, 907 F. Supp. at 1377
16 (granting defendant summary judgment where no evidence "that
17 Netcom's policy directly financially benefits Netcom, such as by
18 attracting new subscribers.") Moreover, the Court finds that
19 there is a strong likelihood that Perfect 10 will establish a
20 "symbiotic interest" between Cybernet and the infringing websites
21 based on the close interrelationship between Cybernet and its
22 affiliated websites, a relationship that appears to outside
23 consumers as if Adult Check constitutes a single brand. See Adobe
24 Systems, Inc. v. Canus Productions, Inc., 173 F. Supp. 2d 1044,
25 1051 (C.D. Cal. 2001) (discussing "symbiotic interest"). It should
26 be noted that all the money associated with these websites flows
27
28

1 directly to Cybernet before some of it is returned to the
2 individual site owners as "commissions." The Court concludes that
3 this evidence creates a strong likelihood Perfect 10 will
4 establish this direct financial interest.

5 Cybernet relies on Adobe Systems, 173 F. Supp. 2d at 1052,
6 to argue otherwise. Adobe Systems involves a copyright action
7 against the proprietor of weekly computer fairs where
8 approximately one hundred pirated copies of Adobe Systems
9 software were located at shows that averaged up to 15,000
10 attendees per weekend. Id. at 1047. On plaintiff's motion for
11 summary judgment the court discussed Fonovisa and its requirement
12 of direct financial benefit. Id. at 1050-53.

13 The Adobe Systems court read into Fonovisa's discussion of
14 vicarious liability a requirement to show "a direct financial
15 benefit to the defendant from the 'draw' of the infringing
16 products." Id. at 1050. At different points in the opinion this
17 idea was expressed in language such as:

- 18
- 19 • "the sale of the counterfeit products must in fact be the
20 'draw' for customers to the venue." Id. at 1050 (emphasis
21 added).
 - 22
 - 23 • "Plaintiffs must show that the vendor's infringement
24 constitutes a draw to the venue to the extent that the
25 economic interests of the direct infringer and those of the
26 landlord become closely intertwined." Id. at 1051.
 - 27

1
2 • "[P]laintiff bears the burden of demonstrating a direct
3 financial benefit to the landlord from 'customers seeking to
4 purchase infringing recordings' and profits which 'flow
5 directly from customers who want to buy the counterfeit
6 recordings.'" Id. at 1050.

7
8 • "Without the requirement that the counterfeit goods provide
9 the main customer draw, Fonovisa would "provide essentially
10 for the limitless expansion of vicarious liability into
11 spheres wholly unintended by the court." Id. at 1051
12 (emphasis added).

13
14 • "Fonovisa found a symbiotic relationship existed between the
15 infringing vendors and the landlord because 'the very
16 success of the landlord's venture depends on the
17 counterfeiting activity (and thus the landlord has every
18 incentive to allow the activity to continue).'" Id. at 1051.

19
20 The Adobe Systems court then concluded that on the facts of the
21 case, where both the number of infringements and the apparent
22 impact of these infringements was small, there was not a
23 symbiotic relationship and that there were triable issues of fact
24 remaining as to whether the infringing products constituted a
25 draw. Id. at 1052.

26 Similarly in Religious Technology, the court found no
27
28

1 evidence of direct financial benefit for Netcom where it received
2 a fixed fee. 907 F. Supp. at 1376-77. The court also found that
3 there was no evidence that infringement by Netcom users enhanced
4 the value of Netcom's services to subscribers or attracted new
5 subscribers. Id. at 1377.

6 This case is unlike Religious Technology because Cybernet
7 receives more than a fixed fee. The income derived from each
8 website is directly based on the site's initial popularity. The
9 more consumers appreciate the content of a page, the more money
10 Cybernet receives. Cybernet's income stream pays no regard to a
11 site's respect for copyright or lack thereof. Additionally,
12 Cybernet (and Adult Check) depends on content to attract
13 consumers. Cybernet has given no reason to believe that these
14 pages do not attract consumers, thereby creating a financial
15 benefit to Cybernet.¹⁷

16 In comparison to Adobe Systems, the present facts pose a
17 closer question, however. Cybernet attempts to hide behind the
18 sheer volume of images on its sites to argue that even 10,000
19 infringing images does not establish a sufficiently direct
20 financial interest or relationship. Opp'n at 22. The Court
21 disagrees. In Adobe Systems, the court implied that the small
22 number of infringing articles was insufficient to support a
23 conclusion that these items provided "a significant draw"
24 bringing consumers to the fairs. 173 F. Supp. 2d at 1053. In
25

26 ¹⁷Additionally, the participating websites actually pay no
27 fees to Cybernet. Instead they are paid by Cybernet.

1 contrast, the Court concludes that there is a strong likelihood
2 Perfect 10 will establish a large number of infringing sites. Cf.
3 Playboy v. Webbworld, 968 F. Supp. 1171, 1177 (finding sufficient
4 financial interest where defendants received a percentage of
5 fixed fee and there were sixty-seven infringing images on site).
6 The Court also concludes that the fortunes of these sites and
7 Cybernet are sufficiently tied to create the requisite direct
8 financial benefit. See Napster II, 239 F.3d at 1023. The Court
9 therefore concludes that Perfect 10 has shown a strong likelihood
10 of success as to the direct financial interest element of
11 vicarious liability.

12 **b. Right or Ability to Control**

13 Cybernet argues that it lacks the right and ability to
14 control the websites because it cannot "affirmatively work as
15 some sort of Internet 'hall monitor,' policing an unruly class of
16 webmasters and responding instantaneously when any copyright
17 infringement occurs." Opp'n at 23. In making this argument, it
18 invokes the protection of the Digital Millennium Copyright Act's
19 "notice and taken-down" provision, which will be dealt with below
20 rather than addressed in this section. Its argument attempts to
21 distinguish the Adult Check system from Napster's system because
22 the images used in the Adult Check system do not pass through
23 Cybernet's hardware. Opp'n at 25. Further, Cybernet argues that
24 it is constrained in its right and ability to control by
25 requirements of actual notice. Id.

26 The notice argument is not relevant as it does not address
27
28

1 Cybernet's control abilities. Rather it addresses when those
2 abilities should be exercised. Focusing on the ability to control
3 the sites found in its system, the Court concludes that Perfect
4 10 has established a strong likelihood of success. As mentioned
5 earlier, Cybernet has a monitoring program in place. Under this
6 program, participating sites receive detailed instructions regard
7 issues of layout, appearance, and content. Cybernet has refused
8 to allow sites to use its system until they comply with its
9 dictates. Most importantly, it monitors images to make sure that
10 celebrity images do not oversaturate the content found within the
11 sites that make up Adult Check. Zadeh Decl., Ex. 30. It forbids
12 certain types of images. This ability to control other types of
13 images belies any attempt to argue that Cybernet does not
14 exercise sufficient control over its webmasters to monitor and
15 influence their conduct or to deny copyright offenders the
16 benefits of its service. See Religious Technology, 907 F. Supp.
17 at 1375 (right and ability to control where "police" powers
18 exercised in past); see also Napster I, 114 F. Supp. 2d at 920-21
19 (online services improved methods of blocking users "tantamount
20 to an admission that defendant can, and sometimes does, police
21 its service").

22 Cybernet, like the swap meet in Fonovisa, not only has the
23 right to terminate webmasters at will, it controls consumer
24 access, and promotes its services. See Fonovisa, 76 F.3d at 262;
25 Napster I, 144 F. Supp. 2d at 920. Combined with its detailed
26 policing of sites, these activities are sufficient to establish a
27
28

1 strong likelihood of success for Perfect 10's argument that
2 Cybernet has the right and ability to control the participating
3 websites.

4 **c. Vicarious Liability - Conclusion**

5 Because Perfect 10 has shown a strong likelihood of
6 establishing a direct financial benefit and the right and ability
7 to control websites that engage in infringing activity, the Court
8 finds there is a strong likelihood of success on Perfect 10's
9 claims for vicarious copyright infringement liability.

10 **4. DMCA**

11 In 1998 Congress passed Title II of the Digital Millennium
12 Copyright Act ("DMCA"), Pub. L.. 105-304, Title II, § 202(a),
13 112 Stat. 2877 (1998)(codified at 17 U.S.C. § 512). The DMCA
14 marked Congress' entry into the online copyright fray. The DMCA
15 created a series of four "safe harbors" to protect "providers of
16 online services" from liability, primarily monetary, based on
17 claims of copyright infringement attributable to the actions of
18 users. See 17 U.S.C. §§ 512(a)-(d),(j). In order to qualify for
19 these safe harbors, a provider of online services must:

- 20
- 21 1) adopt a policy that provides for the termination
22 in appropriate circumstances of subscribers and
23 account holders of the service provider's system
24 or network who are repeat infringers;
- 25
- 26 2) reasonably implement the policy; and
- 27

1 3) inform subscribers and account holders of the
 2 service provider's system or network about the
 3 policy.

4
 5 See 17 U.S.C. § 512(i). The service provider and its policy must
 6 also not interfere with "standard technical measures" used by
 7 copyright owners to protect copyrighted works.¹⁸ See 17 U.S.C. §
 8 512(i)(1)(B).

9 These "safe harbors" do not affect the question of ultimate
 10 liability under the various doctrines of direct, vicarious, and
 11 contributory liability. See H.R. Rep. 105-551(II), at 50 (July
 12 22, 1998); S. Rep. 105-190, at 19 (May 11, 1998). Rather they
 13 limit the relief available against service providers that fall
 14 within these safe harbors. See 17 U.S.C. §§
 15 512(a), (b)(1), (c)(1), (d), & (j).

16 Of these "safe harbors," Cybernet only invokes the harbors
 17

18 ¹⁸The definition of standard technical measures includes a
 19 requirement that they be "developed pursuant to a broad consensus
 20 of copyright owners and service providers in an open, fair,
 21 voluntary, multi-industry standards process." 17 U.S.C. §
 22 512(i)(2)(A). There is no indication that the "strong urging" of
 23 both the House and Senate committees reporting on this bill has
 24 led to "all of the affected parties expeditiously [commencing]
 25 voluntary, inter-industry discussions to agree upon and implement
 26 the best technological solutions available to achieve these
 27 goals." H.R. Rep. 105-551(II), at 61; S. Rep. at 52. It thus
 28 appears to be an open question if any conduct or policy could
 interfere with "standard technical measures." See 3 Nimmer on
Copyright § 12B.02[B][3], at 12B-29 ("Given the incentives of the
 various parties whose consensus is required before any such
 technical measures can win adoption, it seems unlikely . . . that
 the need for any such monitoring will eventuate.")

1 provided by section 512(c), governing information residing on the
2 systems or networks at the direction of users, and section
3 512(d), governing information location tools ("web browsers").
4 Moreover, these "safe harbors" could not apply prior to August 8,
5 2001, the date Cybernet adopted its policy it claims is aimed at
6 compliance with the DMCA. See Costar Group, Inc. v. Loopnet,
7 Inc., 164 F. Supp. 2d 688, 698 n.4 (D. Md. 2001).

8 **a. Is Cybernet A "Service Provider"?**

9 Cybernet devotes a single sentence to arguing that it is a
10 "service provider" as the term is defined in section
11 512(k)(1)(B). Opp'n at 25. This section defines a service
12 provider as a "provider of online services or network access, or
13 the operator of facilities therefor," and includes entities
14 "offering the transmission, routing, or providing of connections
15 for digital online communications, between or among points
16 specified by a user, of material of the user's choosing, without
17 modification to the content of the material as sent or received."
18 17 U.S.C. § 512(k). Section 512(k)(1)(B)'s definition has been
19 interpreted broadly. See ALS Scan, Inc. v. RemarQ Communities,
20 Inc., 239 F.3d 619, 623 (4th Cir. 2001); Hendrickson v. eBay, 165
21 F. Supp. 2d 1082, 1087 ("eBay clearly meets the DMCA's broad
22 definition of online "service provider"). Although there appears
23 to be uniform agreement that the definition is broad, or at least
24 broader than the definition of 512(k)(1)(A) concerning conduit-
25 type services, the Court has found no discussion of this
26 definition's limits.

1 Perfect 10 argues that section 512(c) was drafted with the
2 limited purpose of protecting Internet infrastructure services in
3 mind. Reply at 18. It contends that the definition for a provider
4 of online services or network access does not include services
5 that "participate in the selection or screening of that data or
6 take an interest in the content of that data." Id. at 18 n.19.
7 The inclusion of section 512(d) which creates a "safe harbor" for
8 copyright infringement resulting from the use of information
9 location tools by service providers, which include directories,
10 indexes, references, pointers and hypertext links, strongly
11 suggests that the definition of service provider is meant to
12 include services that only provide location service tools, as
13 well as services providing internet access and such tools. See
14 H.R. Rep. 105-551(II), at 58 (identifying Yahoo! as an example);
15 cf. also 47 U.S.C. § 231(b)(3) (reach of Child Online Protection
16 Act defined by similar categories). The Court adopts that reading
17 and will not use Perfect 10's proposed interpretation to evaluate
18 Cybernet's ability to invoke the protection of section 512's safe
19 harbors.

20 Nevertheless, Cybernet has made this a more complicated
21 issue than it probably should be by its insistence that it does
22 not host any infringing images and no image files pass through
23 any of its computers. Opp'n at 21. This appears to be part of an
24 overall strategy to deny that Cybernet is anything more than an
25 age verification service, somehow beyond the reach of copyright
26 law, with no responsibility for the actions taken on the sites of
27
28

1 the individual webmasters. It may be a close question whether
2 such a service qualifies as a "provider of online services."¹⁹
3 For the moment, however, the Court will assume that Cybernet is a
4 "provider of online services" as defined in section 512(k).

5 **b. Does Cybernet Meet the Minimal Qualifications**
6 **of Section 512(i)?**

7 The initial hurdle Cybernet must meet in order to qualify
8 for section 512(k)'s restrictions on injunctive relief is found
9 in section 512(i). These provisions require an online service
10 provider to develop, promulgate and reasonably implement a policy
11 providing for termination in appropriate circumstances of repeat
12 copyright infringers. 17 U.S.C. § 512(i). In crafting these
13 policies, Congress has given a vague indication of what
14 constitutes "appropriate" circumstances.

15 In the House and Senate Reports considering this subsection,
16 both used identical language. See Ellison v. Robertson, - F.
17 Supp. 2d -, 2002 WL 407696 *1, *12 (C.D. Cal. 2002). The
18 Committees each "recognize[d] that there are different degrees of
19 on-line copyright infringement, from the inadvertent and
20

21 ¹⁹Because Cybernet does run a web-page, adultcheck.com and
22 maintains computers to govern access to the Adult Check family's
23 websites there is good reason to believe that it is an "online
24 service provider" under 512(k)(1)(B). Cf. 47 U.S.C.
25 231(e) (mentioning broad range of online services that an
26 "Internet access service" could also provide); ALS Scan, 239 F.3d
27 at 623; Hendrickson, 165 F. Supp. 2d at 1087. At the same time
28 the fact that no images pass through Cybernet's hardware makes
Cybernet a poor fit for the categories established by the DMCA,
see 17 U.S.C. §§ 512(a)-(d), and Cybernet's service appears to
fall outside the parallel definitions of 47 U.S.C. 231(b).

1 noncommercial, to the willful and commercial." H.R. Rep. 105-
2 551(II), at 61; S. Rep. 105-190, at 62. The Committees also
3 stated that the provision was not intended to undermine
4 principles governing knowledge of infringement and protection of
5 privacy rights "by suggesting that a provider must investigate
6 possible infringements, monitor its service, or make difficult
7 judgments as to whether conduct is or is not infringing." H.R.
8 Rep. 105-551(II), at 61 (emphasis added); S. Rep. 105-190, at 62
9 (same). The Committees then appeared to immediately qualify these
10 statements by stating: "However, those who repeatedly or
11 flagrantly abuse their access to the Internet through disrespect
12 for the intellectual property rights of others should know that
13 there is a realistic threat of losing that access." H.R. Rep.
14 105-551(II), at 61 (emphasis added); S. Rep. 105-190, at 62
15 (emphasis added).

16 Although the last sentence appears directed at the
17 instigators of infringement, each Committee also noted that the
18 DMCA preserves "strong incentives" for "qualifying" service
19 providers to cooperate with copyright holders. H.R. Rep. 105-
20 551(II), at 49; S. Rep. 105-190, at 20. The Court shares concerns
21 expressed by Nimmer and a sister court in this district in
22 recognizing the language of the statute and the legislative
23 history of this section are less than models of clarity. See
24 Ellison, - F. Supp. 2d at -, 2002 WL 406796 at *13 n.15 (treating
25 section 512(i) as a mere threat based on language and history); 3
26 Nimmer on Copyright § 12B.02[B] [2], at 12B-25 & 12B-26

1 (identifying questions left open by statute). Nevertheless, the
2 Court reads section 512(i) to imply some substantive
3 responsibilities for service providers, particularly if the
4 statute is to be read with the apparently broad reach advocated
5 by the other courts that have considered this section.

6 The legislative history does provide some guidelines as to
7 what a section 512(i) policy might look like. The service
8 provider might not need to provide for active investigation of
9 possible infringement.²⁰ No court in construing these
10 requirements should make the knowledge standards more demanding
11 than those found in section 512(c). See H.R. Rep. 105-551(II), at
12 61. The service provider might not need to take action for
13 isolated infringing acts by single users. See 17 U.S.C. § 512(i)
14 (referring to repeat infringers). The service provider need not
15 act or address difficult infringement issues. See H.R. Rep. 105-
16 551(II), at 61. It may not require the service provider to
17 actively monitor for copyright infringement. See id.

18 When confronted with "appropriate circumstances," however,
19 such service providers should reasonably implement termination.

21 ²⁰See H.R. Rep. 105-551(II), at 61. The statement above is
22 qualified by the "standard technical measures" language in
23 section 512(i), which may require such action. See H.R. Rep. 105-
24 551(II), at 53 ("a service provider need not monitor its service
25 or affirmatively seek facts indicating infringing activity
26 (except to the extent consistent with a standard technical
27 measure complying with new subsection [i])"). A failure to impose
an affirmative duty on service providers to hunt out infringers
does not mean, however, that copyright holders cannot investigate
potentially infringing activities and notify providers under a
"reasonably implemented" section 512(i) policy.

1 See 17 U.S.C. § 512(i). These circumstances would appear to
2 cover, at a minimum, instances where a service provider is given
3 sufficient evidence to create actual knowledge of blatant, repeat
4 infringement by particular users, particularly infringement of a
5 willful and commercial nature. See H.R. Rep. 105-551(II), at 61.
6 An evaluation of any such policy would be informed by an
7 awareness of the service provider's function, existing
8 technology, and the expressed Congressional desire not to
9 undermine the privacy and knowledge requirements of the statute,
10 while leaving the law in its "evolving state." See S. Rep. 105-
11 190, at 18.

12 This interpretation tracks that of the Costar court, which
13 found that there were material issues of fact whether a provider
14 of real estate services on the web implemented a "reasonable"
15 termination policy, as well as whether it acted expeditiously in
16 taking down access to infringing material under section 512(c).
17 See 164 F. Supp. 2d at 704. Under this reading, section 512(i) is
18 focused on infringing users, whereas 512(c) is focused primarily
19 on the infringing material itself. This line of reasoning becomes
20 particularly forceful when one considers the limitations on
21 injunctive relief found in section 512(l).²¹

22
23 ²¹Section 512(l) provides that a service provider under
24 subsection (a) may only be restrained from providing access to an
25 infringer by terminating the account or from providing access to
26 a specific, identified online location outside the United States.
27 See 17 U.S.C. 512(l)(B). There is no ability to order such a
28 provider to take down material, presumably because such material
is no longer on the system. See 17 U.S.C. 512(a)(4) (limiting time
copy may reside on system to that "reasonably necessary for the

1 Making the entrance into the safe harbor too wide would
2 allow service providers acting in complicity with infringers to
3 approach copyright infringement on an image by image basis
4 without ever targeting the source of these images. See 17 U.S.C.
5 § 512(c)(1)(C) (only requiring service providers to remove or
6 disable access to the infringing material). It would encourage a
7 risk-taking approach, whereby service providers could allow
8 repeat infringers to flood the web with infringing images knowing
9 the service providers' ignorance of new infringements and the
10 limited relief under 512(1) would prevent anything more than
11 token action and no financial exposure, while the service
12 provider continues to profit on a "non-discriminatory" basis. The
13 incentives for such action were eloquently phrased by Cybernet in
14 support of its arguments why they should not be held accountable
15 for copyright infringement under the Adult Check brand: "a
16 webmaster will quickly switch from one [AVS] to another if he or
17 she feels the AVS is attempting to exert too much control over
18 the content of the participating sites." Lane Decl. ¶ 62.

19 The Court does not read section 512 to endorse business
20 practices that would encourage content providers to turn a blind
21 eye to the source of massive copyright infringement while
22

23 transmission, routing, or provision of connections"). In
24 contrast, service providers, as the term is defined for the other
25 three safe harbor provisions may be restrained from providing
26 access to the material, providing system access to the infringer,
27 or such other injunctive relief as may be considered necessary to
28 restrain infringement at a particular location, if it is the
least burdensome form of relief available to the service
provider. See 17 U.S.C. § 512(1)(A).

1 continuing to knowingly profit, indirectly or not, from every
2 single one of these same sources until a court orders the
3 provider to terminate each individual account.²² Cf. Costar, 164
4 F. Supp. 2d at 705 (restricting application of section 512's
5 "financial benefit" test). The Court does recognize that section
6 512(1) allows for court orders terminating user accounts, but it
7 also recognizes that online service providers are meant to have
8 strong incentives to work with copyright holders. The possible
9 loss of the safe harbor provides that incentive and furthers a
10 regulatory scheme in which courts are meant to play a secondary
11 role to self-regulation. See, e.g., 17 U.S.C. § 512(i)(2)(A). The
12 Court thus views 512(i) as creating room for enforcement policies
13 less stringent or formal than the "notice and take-down"
14 provisions of section 512(c), but still subject to 512(i)'s
15 "reasonably implemented" requirement. It therefore respectfully
16 parts ways with the interpretation of 512(i) in Ellison, in order
17 to maintain the "strong incentives" for service providers to
18 prevent their services from becoming safe havens or conduits for
19

20
21 ²²In response to the unstated premise of Cybernet's
22 arguments that enforcement of the Copyright Act would hurt its
23 business, but not address the ultimate source of the
24 infringement, the Court finds itself sympathetic to the
25 observation in Playboy v. Webbworld: "If a business cannot be
26 operated within the bounds of the Copyright Act, then perhaps the
27 question of its legitimate existence needs to be addressed." 968
28 F.Supp. at 1175. see also Napster II, 239 F.3d at 926 ("Although
even a narrow injunction may so fully eviscerate Napster, Inc. as
to destroy its user base . . . the business interests of an
infringer do not trump a rights holder's entitlement to copyright
protection.")

1 known repeat copyright infringers, at the very least.²³

2 The allegations against Cybernet and the evidence before the
3 Court is consistent with just such a jaded view of Cybernet's
4 activities. Even in opposition, right after pointing out that
5 "some number of webmasters have switched to other AVS vendors and
6 some have even encouraged Cybernet's customers to cancel their
7 subscriptions," Cybernet disclaims any intent to impose
8 "impossible affirmative duties upon itself." Opp'n at 24. In the
9 context of this litigation, the Court sees this as an implicit
10 argument that rooting out repeat infringers imposes such
11 "impossible" duties and finds it runs against Cybernet's argument
12 that it is actually trying to cope with repeat infringers.

13 In opposition to the present motion, Cybernet does assert
14 that it has taken action against individual webmasters as well as
15 against infringing sites. Umbreit Decl. ¶¶ 26-31. Cybernet has
16 not, however, submitted any documentary evidence to support these
17 assertions. Perfect 10's moving papers included examples of
18 infringing conduct on sites that have been identified since the
19 beginning of this litigation. Significantly, in its Opposition
20 Cybernet maintains it does "what it has the power to do - namely,
21 remove from the Cybernet search engine and links page any website
22

23 ²³This case appears to offer an example of such behavior. In
24 Perfect 10's Third Amended Complaint, it identified a site,
25 www.celebpics.com, as one of the problematic Adult Check sites.
26 In its preliminary injunction papers, Perfect 10 now complains
27 about the website www.newcelebpics.com. See Zadeh Decl., Ex. 79.
Although issues of ownership are unclear at this point, the
inference of repeat activity is difficult to avoid.

1 about which it has received a notice of infringement," without
2 addressing its power to stop providing its AVS service to known
3 infringers. Opp'n at 12. The Court finds this lone declaration,
4 unsupported by any documentary evidence, contradicted by evidence
5 in the record, and flying in the face of Cybernet's consistent
6 resistance to the proposition that it could, would or should
7 exercise any control over its webmasters, simply not credible.
8 The record supports the conclusion that Cybernet has taken great
9 pains to avoid shouldering the burdens of the copyright regime,
10 all the while profiting from pirates.²⁴

11 Because the Court finds that there is a strong likelihood
12 that Cybernet cannot establish that it has "reasonably
13 implemented" a policy directed at terminating repeat infringers,
14 even in "appropriate circumstances," there is little likelihood
15 that it can avail itself of section 512's safe harbors.

16 **c. Could Cybernet qualify for the safe harbors**
17 **if it is a "service provider" and has "reasonably**
18 **implemented" a repeat infringer policy?**

19 Even assuming Cybernet could somehow bring itself over the
20 section 512(k) and (i) hurdles to have its conduct evaluated
21 under sections 512(c) and (d), the Court finds that there is a
22 strong likelihood Perfect 10 will prevail on its copyright
23 claims. First the Court notes that Cybernet's assertion that
24 these sections could "exempt" Cybernet from liability is without

25
26 ²⁴This conclusion, formed on the basis of Perfect 10's
27 initial evidence and Cybernet's opposition, obviated any need to
28 consider Perfect 10's reply exhibits.

1 merit. Section 512 does not affect the elements of copyright
2 liability. Instead, it affects the remedies available for any
3 infringement which might be found. The Court will nevertheless
4 address why it believes Cybernet does not comply with the
5 explicit substantive requirements of the DMCA or qualify for
6 either the section 512(c) ("information storage") or (d)
7 ("information location tool") safe harbors.

8 **1. Deficiencies In Notice Procedures**

9 Both the section 512(c) and (d) safe harbors governing
10 information storage and connecting activity, such as link and
11 search engines, respectively, contain parallel notification and
12 counter-notification requirements in an attempt to balance the
13 duties of service providers, the rights of copyright owners and
14 the rights of other users. In general outline, the notice and
15 take-down provisions work as follows:

- 16
17
- 18 1) A copyright owner must contact the service provider
19 and provide written notice meeting certain criteria,
20 see 17 U.S.C. § 512(c)(3);
21
 - 22 2) If the notice fails to fully comply with the stated
23 notice requirements, but substantially complies with
24 three requirements aimed at identifying infringing
25 sites, works and users, the service provider must
26 promptly attempt to contact the person complaining or
27

1 takes other reasonable steps to assist in the receipt
2 of notification that complies with the requirements,²⁵
3 see 17 U.S.C. § 512(c)(3)(B);

4
5 3) Once notice is received, the service provider must
6 expeditiously remove or disable access to the
7 material and must notify the affected user promptly,
8 see 17 U.S.C. § 512(c)(1)(B);

9
10 4) The affected user may then submit a counter-
11 notification consisting of a statement, under
12 penalty of perjury, that the user had a good faith
13 belief that the material was removed as a result
14 of a mistake or misidentification of the material,
15 see 17 U.S.C. § 512(g)(3); and

16
17 5) Upon receiving a counter-notification, the service
18 provider has 10-14 days to replace the material unless
19 the provider's designated agent receives notice that
20 the complaining party has filed a court action,
21 see 17 U.S.C. § 512(2)(C).

22
23 **a. Deviations From Notice Requirements**

24 Cybernet's procedures depart from this statutory scheme in
25

26 ²⁵The Court is inclined to read this "or" in the non-
27 exclusive sense.

1 several quite significant ways. First, Cybernet's policy states
2 that it requires a complaint to meet all its stated notice
3 requirements and there is no indication that Cybernet tries to
4 work with parties whose notice falls within the statute's notice-
5 saving clause, section 512(c)(3)(B)(ii). Second, and even more
6 problematic, Cybernet has altered the notice requirements
7 themselves. Whereas section 512 states "if multiple copyrighted
8 works at a single online site are covered by a single
9 notification, a representative list of such works at that site"
10 must be provided, 17 U.S.C. § 512(c)(3)(A), Cybernet does not
11 appear to allow such a representative list, and it requests only
12 the specific web page at which a given work is located, rather
13 than the site. These apparently small differences might seem
14 innocent enough, but in the framework of this litigation it
15 appears to be an intent to upset the Congressionally apportioned
16 burden between copyright holder and service provider by placing
17 the entire burden on the copyright owner. These differences,
18 combined with the failure to show any flexibility on its policy
19 that a notification meet all of Cybernet's standards, leads the
20 Court to conclude that Cybernet has failed to structure a notice
21 system that complies with section 512.

22 **b. Deviation From Counter-Notification Requirements**

23 The conclusion above is reinforced by Cybernet's counter-
24 notification requirements. The DMCA's counter-notification
25 statement, with its good-faith requirement stated under penalty
26 of perjury, separates good-faith infringers and innocent users
27
28

1 from those who knowingly infringe copyrights. See 17 U.S.C. §
2 512(g)(3). This requirement implicates the "reasonably
3 implemented" policy of § 512(i) because there is an implication
4 that a party who cannot sign the required statement is a knowing
5 infringer. Thus, the counter-notification procedures appear to
6 serve the generally self-policing policy that section 512
7 reflects. Cybernet's counter-notification procedures allow
8 knowing infringers to sidestep this requirement.

9 By stating under penalty of perjury that they removed the
10 named infringing material, a knowing infringer will be
11 reestablished on the Adult Check system. See Zadeh Decl., Ex. 1
12 at 23. On the one hand, this makes sense to the extent that Adult
13 Check can only disable individual pages or sites because it
14 cannot directly access the content. On the other hand, this also
15 allows Cybernet to reinstate an infringer without the
16 Congressionally-required statement and provides cover for
17 Cybernet to water down its termination policy by treating these
18 minimalist take-down statements as neither an admission nor a
19 denial of the copyright infringement allegations, regardless of
20 how blatant the infringement might be. Although there is no
21 evidence on this issue, the record before the Court provides
22 substantial evidence of resistance on Cybernet's part towards
23 addressing copyright violations by its "unruly" webmasters. The
24 DMCA is a carefully-balanced, although sometimes unclear, piece
25 of legislation. See Ellison, - F. Supp. 2d -, 2002 WL 407696 at
26
27
28

*15 n.16.²⁶ Cybernet's DMCA "variant" appears to upset that balance.

2. Direct Financial Benefit and Right and Ability to Control

Both relevant sections exclude from the safe harbor service providers that "receive a benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity." 17 U.S.C. § 512(c)(1)(B), (d)(2). Here, there is significant evidence that Cybernet receives a direct financial benefit. See supra.

In Costar Group, 164 F. Supp. 2d at 704-05, the district court found that a real estate website, which charged the same price to infringing and non-infringing users and did not charge for the service where the infringement was found, did not receive

²⁶The differences between 512(a) and (c), particularly section 512(a)'s lack of any take-down requirement and its limitation of injunctive relief to banning users may be traceable to its language limiting the safe harbor to those situations where "no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing or provision of connections." Cf. Religious Technology, 907 F. Supp. at 1370, 1375 (rejecting direct liability theory based on eleven day storage, but allowing contributory liability theory to go to jury); cf. also 17 U.S.C. § 512(n) ("Subsections (a), (b), (c), and (d) describe separate and distinct functions" but failure to qualify for one safe harbor "shall not affect a determination of whether that service provider qualifies for the limitations" under other categories). Thus, (a) and (c) might be read as the difference between basic infrastructure transmission functions and storage functions, with some service providers engaging in both at the same time. But see Ellison, - F. Supp. 2d -, 2002 WL 407696 at *14 (C.D. Cal. 2002) (adopting different interpretation).

1 a sufficiently direct benefit to fall within the statute. Id. In
2 so concluding, the Court distinguished the Fonovisa line of cases
3 discussed previously by looking to the slightly different
4 language of the statute ("does not receive a financial benefit
5 directly attributable to the infringing activity") and, once
6 again, the legislative history of the DMCA. See id. at 705.

7 This legislative history states:

8
9 In determining whether the financial benefit criterion
10 is satisfied, courts should take a common-sense, fact-
11 based approach, not a formalistic one. In general, a
12 service provider conducting a legitimate business would
13 not be considered to receive a "financial benefit
14 directly attributable to the infringing activity" where
15 the infringer makes the same kind of payment as non-
16 infringing users of the provider's service. . . . It
17 would however, include any such fees where the value of
18 the service lies in providing access to infringing
19 material.

20
21 H.R Rep. 105-551(II), at 54.

22 The Costar court looked at the fact that neither infringing
23 nor non-infringing users paid anything for the service and
24 concluded that the direct financial benefit was lacking. Id. at
25 705. The Court expresses no opinion on the question whether the
26 "directly attributable" language is narrower or equivalent to the
27

1 general vicarious infringement requirements. Rather, the direct
2 flow of income to Cybernet based on the number of new Adult Check
3 users that sign up to Adult Check from infringing sites
4 establishes that direct relationship. See supra. The more new
5 visitors an infringing site attracts, the more money Cybernet
6 makes. This is quite different from the situation in Costar where
7 the site made money on other services it offered, which were not
8 directly tied to the infringing activity. See 174 F. Supp. 2d at
9 704. Applying the common-sense, fact-based approach, the Court
10 finds that the financial benefit is highly likely to be
11 sufficiently direct to work against Cybernet's reliance on the
12 safe harbor.

13 Similarly, with regard to the right and ability to control,
14 the Court agrees with the Hendrickson and Costar courts that
15 closing the safe harbor based on the mere ability to exclude
16 users from the system is inconsistent with the statutory scheme.
17 See Hendrickson, 165 F. Supp. 2d at 1093-94; Costar, 164 F. Supp.
18 2d at 704. As mentioned earlier, section 512 is meant to
19 encourage some level of copyright enforcement activity by service
20 providers, not to punish it. In the parlance of contributory
21 patent infringement cases dealing with the intent requirement for
22 contributory liability of trademark licensors, there must be
23 "something more."²⁷ Here Cybernet prescreens sites, gives them

24
25 ²⁷See LA Gear, Inc. v. E.S. Originals, Inc., 859 F. Supp.
26 1294, 1301 (C.D. Cal. 1994). Although the Court recognizes the
27 contexts are very different - one dealing with intent, one with
28 control - this indefinite language trying to identify when there
is sufficient involvement to infer either, adequately captures

1 extensive advice, prohibits the proliferation of identical sites,
2 and in the variety of ways mentioned earlier exhibits precisely
3 this slightly difficult to define "something more."

4 This combination of financial benefit and ability to control
5 makes it highly unlikely that Cybernet may avail itself of the
6 DMCA safe harbor provisions.

7 **3. Failure to Provide Evidence of Expeditious**
8 **Removal**

9 Additionally, there is no credible evidence presented to the
10 Court that Cybernet has ever *expeditiously* removed infringing
11 material from its system, disabled links, or altered its search
12 engine under its variant of the DMCA policy. Thus, this lack of
13 evidence also defeats Cybernet's likelihood of success in trying
14 to fit into the safe harbor.

15 **4. Conclusions Relevant to Both Safe Harbors**

16 The Court therefore finds that there is little likelihood
17 that Cybernet will qualify for either the information location
18 tool or information storage safe harbors.

19 **5. Copyright Infringement Conclusion**

20 Based on the previous discussion, the Court concludes that
21 Perfect 10 has established a strong likelihood of success for its
22 claims that Cybernet is liable for contributory and vicarious
23 copyright infringement, and has a strong likelihood of showing
24 Cybernet cannot avail itself of section 512's safe harbors. There
25 is, however, a residual chance that Cybernet will qualify for 17
26 _____
27 the nature of the inquiry.

1 U.S.C. § 512(d)'s safe harbor for search engines, but not links.

2 **B. Likelihood of Success on Unfair Competition Claims**

3 Perfect 10's unfair competition claims under California
4 Business & Professions Code § 17200 ("section 17200") primarily
5 descend from allegations concerning various rights of publicity.
6 Perfect 10 argues these claims implicate both the "unlawful" and
7 "unfair" prongs of section 17200.²⁸ See Cel-Tech Communications,
8 Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 181
9 (1999) (discussing various prongs of unfair competition statute).
10 These rights of publicity claims are asserted on behalf of two
11 groups, Perfect 10 models who have assigned their publicity
12 rights to Perfect 10, and other unaffiliated persons, primarily
13 celebrities.

14 **1. Rights of Publicity - Perfect 10 Models**

15 California recognizes two causes of action based on rights
16 of publicity. The first is a common law right that has been
17 recognized since 1931. Gionfriddo v. Major League Baseball, 94
18 Cal. App. 4th 400, 408 (Cal. App. 2001). The elements of this
19 right are:

- 20
21
22 1) the defendant's use of the plaintiff's identity;
23 2) the appropriation of plaintiff's name or likeness
24 to defendant's advantage, commercially or otherwise;

26 ²⁸In light of its conclusions below, the Court need not
27 address the "fraudulent" arm of the statute.

3) lack of consent; and

4) resulting injury.

Id. at 409. The common law right also requires that this right "be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press." Id. (citations omitted).

In addition, California has a statutory right, codified at California Civil Code § 3344 ("section 3344"). Section 3344 provides:

Any person who knowingly uses another's name . . . photograph, or likeness, in any manner, on or in products, merchandise, or goods, . . . without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.

Cal. Civ. Code § 3344. For purposes of the statute, a use of a name, image and likeness in connection with any news or public affairs broadcast does not constitute a use for which consent is required. Cal. Civ. Code § 3344(d). Additionally, the section does not apply to the owners or employees of any medium used for advertising, unless the owners or employees have knowledge of an unauthorized use. Cal. Civ. Code § 3344(f).

1 Neither party contests that third parties operating under
2 the Adult Check name have infringed the rights of publicity
3 assigned to Perfect 10 by a number of models. Nor does either
4 party suggest that direct liability would not be appropriate
5 against those third-parties under either theory. Similarly,
6 Perfect 10 does not assert any direct liability theory against
7 Cybernet. The likelihood of success thus boils down to a question
8 of "aiding and abetting."

9 **a. Could Aiding and Abetting Liability Exist?**

10 California has adopted the joint liability principle laid
11 out in the Restatement (Second) of Torts § 876.²⁹ Under the
12 Restatement,

13
14 For harm resulting to a third person from the tortious
15 conduct of another, one is subject to liability if he:

- 16
17 a) does a tortious act in concert with the other
18 in pursuit to a common design with him,
19 or
20 b) knows that the other's conduct constitutes a
21 breach of duty and gives substantial
22

23
24 ²⁹See Pasadena Unified School Dist. v. Pasadena Fed. of
25 Teachers, 72 Cal. App. 3d 100, 113 (1977), overruled on other
26 grounds, City & County of San Francisco v. United Ass'n of
27 Journeyman & Apprentices, 42 Cal. 3d 810, 812 (1986) (as general
28 principle for intentional torts); Saunders v. Superior Court, 27
Cal. App. 4th 832, 846 (1994) (as principle for unfair competition
claims).

1 assistance or encouragement so to conduct
2 himself, or

3 c) gives substantial assistance to the other in
4 accomplishing a tortious result and his own
5 conduct, separately considered, constitutes
6 a breach of duty to the third person.

7
8 Restatement (Second) of Torts § 876.

9 Cybernet argues that there is no case directly recognizing
10 the applicability of this doctrine to the right of publicity
11 torts. Opp'n at 28. The Court finds this argument unpersuasive,
12 as the Restatement provides a background principle for all tort
13 liability in the state of California. See Saunders, 27 Cal. App.
14 4th at 846.

15 Nor does the Court find convincing Cybernet's argument that
16 the right of publicity itself contains an actual knowledge
17 requirement. Opp'n at 28. Cybernet's citations refer to the
18 requirement that broadcasters of advertisements must have actual
19 knowledge before they can be held liable. See Cal. Civ. Code §
20 3344(f). Cybernet does not claim to be a medium used for
21 advertising, and the Court only focuses on rights of publicity
22 infringements located on the websites, not infringements
23 associated with webmaster banner ads. Rather, Cybernet argues
24 that the knowledge requirement of section 3344(f) is a
25 requirement for "aider and abettor" liability under the statute.

26 The Court concludes otherwise. Although section 3344(f)
27
28

1 provides clear evidence that secondary liability can be imposed
2 for violations of publicity rights, it also provides evidence
3 that the California legislature created a heightened knowledge
4 requirement limited to broadcasters of advertisements. See, e.g.,
5 TRW, Inc. v. Andrews, 534 U.S. 19 (2001) (applying the "expressio
6 unius est exclusio alterius" canon). The California legislature
7 has not extended this requirement to defendants like Cybernet.
8 Cf. Newcombe v. Adolf Coors Co., 157 F.3d 686, 694 (9th Cir.
9 1998) (allowing claim to proceed against company and ad agency
10 where another artist created work). The Court therefore defaults
11 to the background assumption that secondary liability exists and
12 it is found in conformance to the requirements established in the
13 Restatement.

14
15 **b. Is Secondary Liability Likely to Exist?**

16 Perfect 10 has primarily focused its secondary theory of
17 liability on the second branch of the Restatement, requiring
18 actual knowledge of the tortious conduct and substantial
19 participation. Mot. at 32-35. The Court agrees with Perfect 10
20 that there is a serious question on the merits of the substantial
21 participation prong. As it stands, in the absence of argument to
22 the contrary, the Court looks to the contributory infringement
23 framework of copyright trademark law, where it has already found
24 just such participation, thus leading the Court to conclude
25 Perfect 10 has established a strong likelihood of success with
26 regard to Cybernet's substantial participation. See supra. The
27
28

1 Court recognizes, however, that the substantial participation
2 requirement has not been a particular subject of discussion among
3 the California courts, and the parties have not done more than
4 refer to the issue in passing.³⁰

5 Perfect 10 also points to the notification it provided
6 Cybernet covering rights of publicity being violated by websites
7 in the Adult Check network. Mot. at 35. In response Cybernet
8 argues perfunctorily that Perfect 10 has not shown that the
9 owners of Cybernet had knowledge of the unauthorized use of
10 Perfect 10 model images. Opp'n at 28. The Court fails to grasp
11 the significance of the owners' knowledge absent an assertion
12 that Cybernet is an advertising medium, an assertion that the
13 present record would not support. As to Perfect 10 carrying its
14 burden to show actual knowledge, the Court finds that the
15 notification provided Cybernet by the Second Amended Complaint,
16 especially when supplemented by the physical examples of alleged
17 violations provided in a July 12, 2001 letter to Cybernet's
18 counsel, see Mausner Decl., Ex. 47, filed In Support of Pl. Opp'n
19 to Mot. to Dismiss, Aug. 9, 2001, is enough to create a strong
20 likelihood that Perfect 10 will prevail in showing actual
21 knowledge on Cybernet's part.

22 The Court finds the likelihood of success with regard to
23 both elements of the Restatement test creates a strong likelihood
24 that Perfect 10 will succeed on its unfair competition claim to
25

26 ³⁰The Court thus reserves the right to revisit this issue at
27 a later time.

1 the extent it predicates liability on an aiding and abetting
2 theory for the violation's of Perfect 10's rights of publicity.

3 **2. Secondary Liability for Violating the Rights**
4 **of Publicity of Other Celebrities**

5 Perfect 10 has also argued that Cybernet violates the
6 publicity rights of third-party celebrities by tolerating the
7 presence of fake nude pictures that either claim to be actual
8 pictures of these celebrities or that advertise themselves as
9 "fakes." Mot. at 31.

10 **a. Standing**

11 In an earlier order, the Court found that Perfect 10 had
12 adequately plead constitutional standing to assert these rights
13 under the unfair competition statute. See Perfect 10, Inc. v.
14 Cybernet Ventures, Inc., 167 F. Supp. 2d 1114, 1125 (C.D. Cal.
15 2001). Then in a subsequent order, the Court addressed the
16 prudential limitations on standing by reading Perfect 10's
17 complaint as one directed primarily at protecting its own
18 interests and not necessarily vindicating the rights of third-
19 parties. See Motion Granting in Part and Denying in Part Second
20 Motion to Dismiss at 21 ("2d MTD Order"). This running battle
21 over standing continues in the present motion.

22 Cybernet argues that Perfect 10 lacks standing because it is
23 not a competitor of Adult Check. Opp'n at 32. Cybernet makes this
24 argument by mischaracterizing the plain language of Perfect 10's
25 contentions in a state court action. See Jenal Decl., Ex. A at 7
26 (state court brief). This parallel case concerned Perfect 10's
27
28

1 access to former Cybernet employees, presumably contacted for
2 purposes of investigating the facts underlying this action.
3 Cybernet does not quote the relevant language in full in its
4 papers, but it does assert that "As a factual matter, Perfect 10
5 admits it is not Cybernet's competitor." Opp'n at 32. The Court
6 finds that, as a factual matter, this is simply incorrect.

7 The unquoted portion of the brief states:
8

9 The fact that Perfect 10 does not compete against
10 Cybernet for the purpose of trade secret law *does not*
11 *mean that Cybernet cannot be sued by Perfect 10 in the*
12 *federal action for unfair competition[.] Cybernet*
13 *permits and assists its Adult Check Websites to steal*
14 *photos and images from Perfect 10 magazine and*
15 *<www.perfect10.com. and unlawfully display those photos*
16 *and images. It also provides consumer access to that*
17 *stolen property for a fee.*

18
19 Jenal Decl., Ex. A at 7 (emphasis added).

20 The Court finds this mischaracterization to be fairly
21 blatant and it plays into the Court's concerns over the
22 credibility of Cybernet's declarants.³¹ Moreover, the Court has
23

24 ³¹In the interest of fairness, the Court notes that Perfect
25 10 has also on occasion been known to adopt strained readings in
26 support of its position. See Mot. at 22 (reading Cybernet's
27 instructions to webmasters to "sell sizzle, not steak" as advice
to show improper pictures to prospective customers before they
log onto Adult Check). Nevertheless, Cybernet has shown a much

1 concerns about Cybernet playing "fast and loose" with its
2 assertions, and warns Cybernet that judicial estoppel is a
3 doctrine that may not work to its benefit.

4 Turning to the merits, Cybernet and Perfect 10 both compete
5 for consumers' adult entertainment viewing dollars. They both
6 peddle images on the web in an industry where, by Cybernet's own
7 admission, price counts. The Court finds this is a strong
8 indication of competition, particularly where Adult Check
9 webmasters attract consumers using Perfect 10's own material. Cf.
10 Brookfield Communications, Inc. v. West Coast Entertainment
11 Corp., 174 F.3d 1036, 1063-65 (9th Cir. 1999) (discussing initial
12 interest confusion). Because the record supports a finding of
13 competition and Cybernet has raised no other arguments, the Court
14 finds that Perfect 10 has met Cybernet's current standing
15 challenge.

16 **b. Likelihood of Success - Third Party Rights**

17 As this again disposes of the standing issues raised by the
18 parties, the Court then turns to the question of Perfect 10's
19 likelihood of success when it comes to third-party rights of
20 publicity. There are two relevant classes of celebrities - those
21 that have complained to Cybernet and those that have not. Mindful
22

23 greater tendency to make assertions that simply cross the line of
24 credulity. Compare First Mot. to Dismiss at 13 ("Quite frankly,
25 given the nature of the entertainment business, it would seem
26 that there is no such thing as bad publicity for these kinds of
27 people [referring to celebrities.]") with Rudolph Decl., Ex. A,
filed Dec. 3, 2001 at 9-10 (graphic depiction of pop star in
digitally-altered "action shot").

1 of the prudential limitations on standing despite Perfect 10's
2 status as Cybernet's competitor, see Viceroy Gold Corp. v. Aubry,
3 75 F.3d 482, 488 (9th Cir. 1995), the Court concludes that
4 Perfect 10 only stands a likelihood of success on its claims of
5 unfair competition for those celebrities who have already
6 complained to Cybernet about unauthorized uses of their publicity
7 rights.³²

8 The Court finds that there are indeed celebrities who have
9 complained to Cybernet about uses of their images. See Milano
10 Decl. Cybernet has not made any argument that it has taken any
11 actions to remove these offending images or sites from its
12 service. This combination of actual knowledge, acceptance of the
13 benefits from these sites, and lack of action, if proved at
14 trial, which the Court finds likely, would expose Cybernet to
15 aiding and abetting liability for these celebrity images as well.
16 See supra. Limited to those celebrities who have complained about

17
18 ³²The Court finds the differences in proof between those who
19 have complained and those who have not will strongly effect the
20 likelihood of success. Further, this ensures that there is a
21 sufficient unity of interest and that the use of any image is
22 truly "unfair" and/or "unlawful." See Viceroy Gold, 75 F.3d at
23 488 (goal of third-party standing is to avoid adjudicating rights
24 a third-party might not wish to assert and to ensure effective
25 advocacy). To the extent third-party standing is implicated, both
26 goals recognized in Viceroy are met once a person has complained
27 about use of their image. Although the relationship between
28 Perfect 10 and those who have complained is not close, based on
the evidence before the Court, their interests align and the
ability of these third-parties to assert their rights is severely
hindered by the architecture of Cybernet and the internet. This
is evidenced by the large investment of time and resources
devoted by Perfect 10 to identifying individual images and sites
for this litigation.

1 use of their images and identities, the Court therefore finds a
2 strong likelihood that Perfect 10 will succeed on its claim
3 against Cybernet based on the violations of third-party
4 celebrities' publicity rights. This predicate act also provides a
5 strong likelihood of success for Perfect 10's unfair competition
6 claim.

7 **3. Ultimate Likelihood of Success on Unfair Competition**
8 **Claim**

9 The Court concludes that the likelihood of success on these
10 right of publicity claims creates a high likelihood of success on
11 both the "unlawful" and "unfair" prongs of California's unfair
12 competition statute, section 17200. See Sun Microsystems, Inc. v.
13 Microsoft, Inc., 87 F. Supp. 2d 992, 999 (N.D. Cal.
14 2000) (discussing similar competitive injury sufficient to meet
15 "unfair" prong as "incipient violation of antitrust laws"); Cel-
16 Tech, 20 Cal. 4th at 180 (discussing "unlawful" prong).

17 The Court recognizes that application of secondary liability
18 principles is particularly applicable for claims of unfair
19 competition, as the California Supreme Court recognized as far
20 back as 1935: "When a scheme is evolved which on its face
21 violates the fundamental rules of honesty and fair dealing, a
22 court of equity is not impotent to frustrate the consummation
23 because the scheme is an original one." American Philatelic Soc'y
24 v. Claibourne, 3 Cal. 2d 689, 698-99 (1935).

25 In American Philatelic, a purveyor of stamps altered his
26 normal stamps to resemble rare perforated stamps. Id. at 692. He
27
28

1 then sold these stamps to stamp dealers with clear notice that
2 the stamps were not of the rare variety. Id. at 694.
3 Nevertheless, his sales brochures and pricing established that he
4 both anticipated and effectively encouraged these dealers to sell
5 the stamps to the public as rare stamps. Id. The California
6 Supreme Court had no problem finding these claims stated a claim
7 under the unfair competition law. Id. at 697. Saunders, American
8 Philatelic, and Cel-Tech's quotation of American Philatelic's
9 equity language reinforce the Court's conclusion that Perfect
10 10's theory of aiding and abetting liability for Cybernet based
11 on third-party violations of various rights of publicity has a
12 strong likelihood of success.³³

13 C. TRADEMARK INFRINGEMENT

14 1. Elements of Trademark Infringement

15 In order for Perfect to prevail on its trademark claim
16 Perfect 10 must show:

- 18 1) that a mark is owned and associated with Perfect 10;
- 19 and
- 20 2) the defendants' use of the mark is likely to cause

22 ³³The Court finds Emery v. Visa Int'l Serv. Assoc., 95 Cal.
23 App. 4th 952 (2002), is not applicable to the present situation.
24 In Visa the alleged unfair practice involved a duty to
25 investigate the truth of statements made by others -- a duty
26 specifically defeated by California case law, Visa's lack of
27 control, and an alleged unlawful act that involved a violation of
California's Penal Code. Cybernet's power to police extends much
farther than the policing of one's mark referred to in Visa and
the predicate acts are based on civil doctrines of liability.

1 confusion or mistake among the general public.

2
3 Sega Enterprises, Ltd. v. MAPHIA, 948 F. Supp. at 936.

4 **2. Perfect 10's Trademark and Service Mark**

5 Perfect 10 has brought forward its trademark and service
6 mark registration certificates. Mausner Decl., Ex. B at 59, 62.
7 This is *prima facie* evidence of the validity of the trademark,
8 Perfect 10's ownership of the mark, and its exclusive right to
9 use the mark. 15 U.S.C. § 1057(b). At the same time, Perfect 10
10 has asserted that it has trademark rights in the names of its
11 models, but has not adequately established this fact.³⁴ See Mot.
12 at 10. The Court therefore restricts its discussion to the
13 "Perfect 10" trademark.

14 **3. Direct Infringement - Standards**

15 Perfect 10 advances two theories of trademark infringement
16 that it claims are widespread on the Adult Check websites:
17 unauthorized usage of its actual trademark and reverse palming
18 off. Mot. at 39.

19 Section 1114 of the Lanham Act prohibits the use of "any
20 reproduction, counterfeit, copy or colorable imitation of a
21 registered mark in connection with the sale, offering for sale,
22 distribution, or advertising of any good for services or in
23 connection with such use [when such use] is likely to cause
24 confusion." The statute is intended to protect consumers against

25 _____
26 ³⁴Perfect 10 has produced assignments of "any" trademark
27 rights owned by the models, but has failed to present any
28 evidence that they had trademark rights to give.

1 | deceptive designations of the origin of goods, as well as
2 | preventing the duplication of trademarks. Westinghouse Elec.
3 | Corp. v. General Circuit Breaker & Elec. Supply, Inc., 106 F.3d
4 | 894, 899 (9th Cir. 1997). Direct usage of a mark by unauthorized
5 | users can lead to the public's belief that the mark's owner
6 | sponsors or otherwise approves of the use of the trademark.
7 | Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604
8 | F.2d. 200, 204 (2d Cir. 1979). This can satisfy the likelihood of
9 | confusion and can justify a court granting injunctive relief. See
10 | id. at 204-205.

11 | Reverse passing off occurs when someone markets a product as
12 | their own, although the product was created by someone else. See
13 | Summit Machine, 7 F.3d at 1437, 1441. This doctrine has been
14 | limited to situations of bodily appropriation. Shaw v. Lindheim,
15 | 919 F.2d 1353, 1364 (9th Cir. 1990).³⁵ Bodily appropriation is
16 | defined in the copyright context as "copying or unauthorized use
17 | of substantially the entire item." See Cleary v. News Corp., 30
18 | F.3d 1255, 1261 (9th Cir. 1994). In the context of reverse
19 | palming off, this definition is useful because it recognizes that
20 | slight modifications of a product might cause customer confusion,
21 | while products which are merely generally similar will not. Id.

22 | 4. Direct Infringement - Likelihood of Success

23 | Perfect 10 has brought forward evidence that a number of
24 | Adult Check webmasters engage in both forms of trademark

25 |
26 | ³⁵The considerations under California state law for reverse
27 | palming off are the same as they are for reverse palming off
28 | under the Lanham Act. See Summit Machine, 7 F.3d at 1441-42.

1 | infringement. The Court therefore finds that there is a strong
2 | likelihood that Perfect 10 will establish direct infringement by
3 | individual Adult Check webmasters.

4 | **5. Contributory Infringement**

5 | Perfect 10 does not maintain that Cybernet has directly
6 | infringed its trademark. Rather, it relies on a theory of
7 | contributory liability. Contributory liability may be imposed
8 | where the defendant: (1) intentionally induces another to
9 | infringe on a trademark or (2) continues to supply a product
10 | knowing that the recipient is using the product to engage in
11 | trademark infringement. Fonovisa, 76 F.3d at 264. Perfect 10 does
12 | not argue that Cybernet intentionally induced the infringement
13 | and Cybernet correctly points out there is no evidence of such
14 | intentional inducement. Opp'n at 29. This brings the Court to the
15 | second method of establishing contributory infringement.

16 | The Ninth Circuit has recognized that courts must consider
17 | the extent of control exercised by a defendant over a third-
18 | party's means of infringement when dealing with the second test
19 | and the fact pattern does not fit well into the "product" mold.
20 | Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980,
21 | 984 (9th Cir. 1999). Thus direct control and monitoring of the
22 | instrumentality used by a third-party to infringe the plaintiff's
23 | mark can lead to liability. Id. These considerations are similar,
24 | if not completely equivalent, to the principles applicable in the
25 | copyright context. See Fonovisa, 76 F.3d at 265.

26 | Although trademark liability is more narrowly circumscribed
27 |
28 |

1 | than copyright liability, similar principles underlie
2 | contributory trademark infringement. See Fonovisa, 76 F.3d at
3 | 265. This second test can be met where one knows or has reason to
4 | know of the infringing activity, and it specifically covers those
5 | who are "willfully blind" to such activity. Id.

6 | Cybernet maintains that there is no evidence that Cybernet
7 | had knowledge of the trademark infringement. Although the
8 | evidence is not as clear cut as Cybernet maintains, Perfect 10
9 | does not contest the point. The Court therefore declines to
10 | express a view on the strength of Perfect 10's evidence with
11 | regard to contributory trademark infringement.

12 | 6. Trademark Conclusion

13 | Because Perfect 10 has insufficiently asserted its argument
14 | against Cybernet for trademark infringement, the Court declines
15 | to find a strong likelihood of success at this point.

16 | D. CONCLUSIONS - LIKELIHOOD OF SUCCESS

17 | Perfect 10 has:

- 18 |
19 | 1) not established a strong likelihood of success on its
20 | direct copyright infringement claims against Cybernet;
- 21 | 2) established a strong likelihood of success on its
22 | contributory infringement claims against Cybernet;
- 23 | 3) established a strong likelihood of success on its
24 | vicarious infringement claims against Cybernet;
- 25 | 4) established a strong likelihood of success on its
26 | unfair competition claims against Cybernet based on
27 |
28 |

1 rights of publicity assigned to Perfect 10;

2 5) established a strong likelihood of success on its
3 unfair competition claims against Cybernet based on
4 violations of third-party rights of publicity where
5 those third-parties have complained to Cybernet about
6 use of their images or identities by affiliated Adult
7 Check webmasters;

8 6) has not established a likelihood of success on its
9 trademark claims against Cybernet.
10

11 VII. UNCLEAN HANDS?

12 Cybernet contends that even if the Court could find that
13 Perfect 10 has raised serious issues or a strong likelihood of
14 success over its various claims, the Court should deny injunctive
15 relief because of Perfect 10's "unclean hands." Opp'n at 38-39.
16 The unclean hands doctrine may apply when the alleged misconduct
17 occurs in a transaction directly related to the matter before the
18 court and the conduct affects the equitable relationship between
19 the litigants. Newman v. Checkrite Cal., Inc., 912 F. Supp. 1354,
20 1376 (E.D. Cal. 1995).

21 Cybernet points to two websites, www.celebshop.com and
22 www.celebritypictures.com, which contain Perfect 10 advertising
23 banners. Opp'n at 38-39. Both websites, true to their names,
24 contain the same type of pictures that Perfect 10 has fought
25 against so vociferously in this action. Perfect 10, apparently
26 realizing the awkward appearance, confesses that it entered into
27
28

1 settlement agreements with several websites after complaining
2 about infringements of Perfect 10 copyrights. Reply at 13; Zadeh
3 Decl. II ¶ 13; Mausner Decl. II ¶¶ 8-14. According to these
4 agreements, the sites would provide for banner advertising as
5 part of the settlement terms. At the time, Perfect 10 claims it
6 did not realize the unfair competitive advantage these types of
7 sites had over its operation. Zadeh Depo. at 310-11.

8 The Court finds Perfect 10's basic explanation credible.
9 Although these agreements do tarnish Perfect 10's crusading
10 stance, they do not alter the strength of its arguments.
11 Moreover, Cybernet's argument implies that the best solution to
12 illicit behavior in an industry that appears to be rife with it,
13 is to ignore it when the plaintiff appears sullied, too. The
14 Court finds that there is a strong public interest in protecting
15 intellectual property rights, and that the better solution is to
16 bring parties into conformance with the law's dictates. The Court
17 is also quite cognizant of the harms being inflicted on other
18 third parties when policies that encourage pirating behavior of
19 this kind are left unchecked. Although Perfect 10's hands are not
20 "clean as snow," the Court finds the strength of their case and
21 the public interest make this issue one better left to trial and
22 finds it insufficient to justify denying injunctive relief. See
23 Goto.com v. Walt Disney Co., 202 F.3d 1199, 1209-10 (9th Cir.
24 2000); EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 753 (9th Cir.
25 1991).

1 **VIII. IRREPARABLE HARM**

2 Cybernet makes three major arguments attacking Perfect 10's
3 showing on the issue of irreparable harm. First, Cybernet invokes
4 the doctrine of laches and argues that this defeats any inference
5 of irreparable harm. Opp'n at 16-17. Additionally, Cybernet
6 maintains that Perfect 10 has failed to establish a sufficient
7 likelihood of success on its claims to entitle it to the
8 presumption of irreparable harm granted to those who make a
9 strong showing of copyright infringement or unfair business
10 practices. Id. at 16. Finally, Cybernet contends Perfect 10 has
11 failed to show irreparable harm. Id. at 17. The Court will
12 address each contention.

13 **A. LACHES**

14 Perfect 10 filed its complaint on March 20, 2001, served
15 Cybernet in May, 2001 and filed the present motion on January 7,
16 2002. Cybernet argues that the nine month period from March until
17 January defeats any inference of irreparable harm. Opp'n at 16-
18 17. The Court does not agree. Perfect 10 points to the need for
19 discovery and the stonewalling of Cybernet as reasons for the
20 delay. Reply at 20-21. The Court find these explanations to be
21 adequately supported by the record. They are strengthened by the
22 constant stream of motions in the case, including three motions
23 to dismiss and the multiplicity of theories in the case, which
24 may have reasonably delayed the proceedings. See Tough Traveler,
25 Ltd. v. Outbound Prod., 60 F.3d 964, 968 (2d Cir. 1995). Further,
26 there is no harm to plaintiff from the delay. Cf. Ocean Garden
27
28

1 Inc. v. Markettrade Co., Inc., 953 F.2d 500, 508 (9th Cir.
2 1991)(six months, no laches, no harm to plaintiff). If anything,
3 the gap should have provided Cybernet with sufficient time to
4 evaluate its systems, and put in place a program designed to
5 adequately address its potential liability. The Court thus finds
6 the nine month delay between the filing of the complaint and the
7 filing of this motion is not sufficient to raise the laches bar.
8 Cf. Napster I, 114 F. Supp. 2d at 900 (granting preliminary
9 injunction nine months from the date complaint filed).

10 **B. PERFECT 10'S FAILURE TO SHOW A SUFFICIENT LIKELIHOOD**
11 **OF SUCCESS**

12 In copyright and unfair competition cases, irreparable harm
13 is presumed if once a sufficient likelihood of success is raised.
14 See Micro Star v. Formgen, Inc., 154 F.3d 1107, 1109 (9th Cir.
15 1998)(copyright); Vision Sports, Inc. v. Melville Corp., 888 F.2d
16 609, 612 n.3 (9th Cir. 1989)(unfair competition). Cybernet's
17 contention that Perfect 10 has failed to show a sufficient
18 likelihood of success to raise this presumption must fall as to
19 the claims for which the Court has already concluded otherwise.
20 Thus, irreparable harm may be presumed.

21 **C. EVIDENCE OF PERFECT 10'S IRREPARABLE HARM**

22 The Court need not rest on the presumption of irreparable
23 harm, however. Cybernet argues that Perfect 10 has failed to
24 provide any evidence of harm, see Opp'n at 17-18, but the Court
25 finds the record justifies the conclusion that Perfect 10 will
26 suffer irreparable harm. Perfect 10 and Adult Check are
27
28

1 competitors. Adult Check is the largest AVS on the web and
2 services approximately 2 million users each day. A significant
3 number of the sites that attract these users and their funds
4 utilize Perfect 10's copyrighted works, the images of celebrities
5 who have complained about the use of their likenesses, or a
6 combination of both, superimposing celebrities onto the bodies of
7 Perfect 10's models. These sites charge less than Perfect 10, and
8 Adult Check appears to contain more of Perfect 10's images than
9 it owns itself. Cybernet's efforts to show the poor success of
10 Perfect 10 reinforce this. Perfect 10 loses approximately \$4
11 million to \$5 million dollars per year. Just a small shift in the
12 viewing habits of Adult Check's millions of users would have a
13 significant effect on Perfect 10's bottom line. All told, the
14 large losses being sustained by Perfect 10, suffered in this
15 competitive context, justify a finding of irreparable harm.

16 **D. BALANCE OF HARDSHIPS**

17 The Court finds that the balance of hardships weighs
18 significantly in favor of plaintiff, further justifying a grant
19 of injunctive relief. Based on the evidence before the Court it
20 appears that Cybernet profits from the infringing and unlawful
21 activities of its webmasters without shouldering any of the
22 undesired burdens associated with protection of intellectual
23 property rights. The Court finds this willful blindness harms
24 Perfect 10, defeats the rights of third-parties who find
25 themselves displayed on these sites against their will, and skews
26 the online adult market. Perfect 10 has already spent an
27
28

1 inordinate amount of time researching these infringements, forced
2 to pay a competitor in order to discover the infringing images on
3 the Adult Check system.³⁶ Cybernet is not only in position to
4 exercise its ability to control the content of the system - it
5 already does when it suits its financial interests. Moreover, the
6 tolerance of pirating behavior by the country's largest AVS
7 system harms the public by rewarding illicit behavior. The
8 balance of hardships favors Perfect 10 and favors injunctive
9 relief.

10 The Court will therefore GRANT Perfect 10's motion for a
11 Preliminary Injunction. The Court does not, however, agree with
12 Perfect 10's proposed terms.

13 **X. TERMS OF THE INJUNCTION**

14 Although the Court has concluded that Perfect 10 is entitled
15 to injunctive relief, there are goals that must be kept in mind
16 in crafting the scope of relief:

- 17
- 18 1) preventing future infringement;
 - 19 2) preventing continuing infringement;
 - 20 3) encouraging the cooperative system envisioned by
 - 21 Congress;
- 22

23 ³⁶The Court observes that the operations of the Adult Check
24 system, with Cybernet's service understandably preventing
25 unfettered access, also works to prevent various intellectual
26 property rights holders from effectively protecting their rights.
27 This situation poses a difficult challenge to section 512's
28 accommodation of "standard technical measures" where it is
unclear that any such standard has been developed.

- 1 4) consistency with the statutory framework discussed
2 above; and
3 5) striking the right balance between protecting
4 intellectual property rights and avoiding unduly
5 burdensome requirements on Cybernet and its users.
6

7 Evaluated against these goals, Perfect 10's proposed order
8 suffers from some shortcomings. The Court therefore has modified
9 the proposed injunction. At the hearing, both parties had
10 questions and concerns over the Court's proposed injunction. The
11 Court addresses the most salient points now.

12 During the hearing, Cybernet requested clarification on the
13 scope of the first paragraph. This first paragraph covers
14 websites directly operated by the defendants.

15 Additionally, Cybernet raised several objections to the
16 Court's imposition of affirmative duties to search through its
17 system for infringing material. First, Cybernet argued that these
18 duties require more than the bare minimums of the DMCA. The
19 injunction does require more than the bare minimum of the DMCA,
20 but these affirmative duties are justified by the Court's
21 scepticism that Cybernet can ever qualify for the DMCA's safe
22 harbor provisions because of the DMCA's vicarious liability
23 provisions.³⁷ Moreover, assuming Cybernet may eventually be
24

25 ³⁷See supra; A & M Records, Inc. v. Napster, Inc., 2001 WL
26 227083 *1 (N.D. Cal. 2001) (requiring Napster to use "reasonable
27 measures" to identify variations in file names) ("Napster III");
28 see also A & M Records, Inc. v. Napster, Inc., - F.3d -, 2002 WL
449550 *1, *4 (9th Cir. 2002) (affirming shut-down order where

1 entitled to take advantage of the safe-harbor provisions, the
2 affirmative requirements of the injunction ensure that its prior
3 disregard of copyrights is cured.

4 Second, Cybernet also objected that the injunction overall
5 is too burdensome. The Court disagrees. The injunction simply
6 requires Cybernet to utilize its current site review function to
7 a) remedy past tolerance of infringing activity and b) prevent
8 infringers from joining the Adult Check family. The injunction
9 orders Cybernet to treat copyright protection and respect for
10 rights of publicity as elements of its business model that are
11 equally as important to Cybernet as currently are the color,
12 layout, prevention of certain content, and prevention of over-
13 saturating use of celebrities. It is no more burdensome than the
14 injunction granted in Napster, and falls significantly short of
15 the shut-down order the Ninth Circuit recently upheld. See
16 Napster III, 2001 WL 227081 at *1; Napster IV, - F.3d at -, 2002
17 WL 449550 at *4.

18 Cybernet's argument, however, does have validity in light of
19 Perfect 10's apparent belief that the injunction's terms create a
20 strict liability for any infringing images found on the Adult
21 Check sites. Perfect 10's reading of the injunction is incorrect.
22 Cybernet has an affirmative duty as set out in the injunction,
23 but the Court recognizes that not every violation of copyright or
24

25 Napster "failed to prevent infringement of all of plaintiffs'
26 noticed copyrighted works" because "more could be done to
27 maximize the effectiveness of the new filtering
28 mechanism") ("Napster IV").

1 rights of publicity will be caught.

2 Instead, the injunction requires Cybernet's reviewing staff
3 to take action against sites containing images which a well-
4 trained site reviewer should catch. The adoption of a DMCA-
5 compliant plan is meant to ensure the removal of infringing
6 images that make it through the reviewers' initial screening of
7 websites. The knowledge requirement goes beyond the DMCA's "red
8 flag" test, however, because previous enforcement efforts suggest
9 a strong tendency on Cybernet's part to enforce no more than it
10 perceives to be the minimal requirements imposed upon it. The
11 Court may revisit this issue if substantial questions of
12 compliance with the injunction or burden issues arise, but it
13 must be stressed that the injunction, like the DMCA, create a
14 framework where all but the most difficult issues should be
15 resolvable without the Court's intervention.

16 Third, Cybernet requested a multi-million dollar bond, but
17 the Court concludes that a \$600,000 bond is sufficient. The only
18 requirements of the injunction beyond the DMCA's requirements or
19 Cybernet's current practice of reviewing sites are the imposition
20 of a single, thorough review of the Adult Check Gold sites,
21 periodic review of infringing sites, and the training costs for
22 Cybernet's review staff. Assuming a doubling of Cybernet's
23 twelve-employee site review staff coupled with proper training,
24 the Court concludes that such a bond will be sufficient to meet
25 Cybernet's increased costs. The parties should keep in mind that
26 the terms of this preliminary injunction may differ significantly
27
28

1 from the terms of any permanent injunction, should Perfect 10
2 succeed on its claims. The scope of this order is meant to
3 address the situation as it now stands, not as it might be after
4 a trial of the issues.

5 Finally, the Court has applied uniform standards in
6 addressing the copyright and right of publicity concerns, despite
7 the differing sources of the rights, because the Court recognizes
8 the similar natures of the two rights insofar as technological
9 limits and notice difficulties inhere in policing their use on
10 the internet.

11 **XI. CONCLUSION**

12 For the reasons above, Perfect 10's motion for a preliminary
13 injunction is GRANTED.

14 It is hereby ordered that during the pendency of this action
15 and until final judgment is entered, defendants Cybernet
16 Ventures, Inc. ("Cybernet"), AEI Productions, Inc., Sean Devine,
17 Funet, Inc., F-T-V Corp., F-T-V.net and Vic Toria and their
18 agents, servants, directors, officers, principals, employees,
19 representatives, subsidiary and affiliated companies, assigns,
20 and those acting in concert with them or at their direction
21 (collectively, "Defendants") are enjoined as follows:

22
23 1. Defendants shall not do any of the following on or in
24 connection with any websites individually operated by them: (a)
25 invoke or display the name, likeness or identity of any of the
26 "Identified Celebrities and Models" (as defined in paragraph 9
27
28

1 below); or (b) display, copy or distribute any "Perfect 10 Works"
2 as defined in paragraph 11 below) or images substantially similar
3 thereto (collectively, the "Prohibited Content").
4

5 2. Cybernet shall not include in its search engine or any
6 database any of the Prohibited Content and Cybernet shall not
7 produce any search results of any kind in which the names or
8 identities of the Identified Celebrities and Models are invoked
9 in search requests or queries on its search engine.
10

11 3. Cybernet shall not permit access to any "Identified
12 Website" (as hereafter defined) via links on Cybernet's website
13 or through the use of an Adult Check ID, nor shall Cybernet
14 otherwise permit an Identified Website to use any of Cybernet's
15 computer facilities unless the Identified Website's owner,
16 operator, or agent registered with Cybernet has complied with
17 counter-notification procedures no less stringent than those
18 found in 17 U.S.C. § 512(g) and the website owner is not an
19 appropriately terminated user under a policy complying with 17
20 U.S.C. § 512(i). Cybernet shall use an identical counter-
21 notification standard for alleged copyright and right of
22 publicity violations. "Identified Website" shall mean any of the
23 following:
24

25 (a) Any Adult Check website that Cybernet knows or has
26 reason to know contains any Prohibited Content (as defined in
27
28

1 Paragraph 10 below), unless the website operator produces Rights
2 Documentation for all Prohibited Content or a counter-
3 notification meeting standards no less stringent than those found
4 in 17 U.S.C. § 512(g).

5
6 (b) Any Adult Check website identified in Exhibit B to
7 the Third Amended Complaint, unless the website operator produces
8 Rights Documentation for all Prohibited Content or a counter-
9 notification meeting standards no less stringent than those found
10 in 17 U.S.C. § 512(g).

11
12 (c) Any Adult Check website that Cybernet is given or
13 has been given adequate notice that it contains Prohibited
14 Content, unless the website operator produces Rights
15 Documentation for alleged Perfect 10 Works and any content
16 concerning the Identified Celebrities and Models or a counter-
17 notification meeting standards no less stringent than those found
18 in 17 U.S.C. § 512(g).

19
20 4. Prior to their addition to the Adult Check network,
21 Cybernet shall review the content of websites to determine
22 whether they contain any Prohibited Content; if the website
23 contains such content and such content is reasonably apparent, or
24 the website specifically disclaims copyright ownership or
25 permission for those images protected by the right of publicity,
26 then it shall not be added to the Adult Check network, unless the
27

1 website operator produces Rights Documentation for such content.

2
3 5. Cybernet shall review on a monthly basis the content of
4 any website that has, at any time, removed content based on right
5 of publicity or copyright allegations without submitting a
6 statement to Cybernet containing at least the information
7 identified in 17 U.S.C. § 512(g), or is operated by a webmaster
8 Cybernet knows or has reason to know has operated a website as
9 described immediately above, in order to determine whether there
10 exists any reasonably identifiable Prohibited Content on that
11 website.

12
13 6. Within 90 days of entry of this Order, Cybernet shall
14 review the content of each Gold website in order to determine
15 whether there exists on the website any reasonably identifiable
16 Prohibited Content.

17
18 7. Within 90 days of the entry of this Order, Cybernet
19 shall require that each Adult Check Website in Cybernet's
20 celebrity category produce for Cybernet's inspection, a copy of
21 which shall be served on Perfect 10, Rights Documentation
22 establishing its right to display the images of any person who
23 has lodged a complaint with Cybernet about the use of his or her
24 image on Adult Check affiliated websites. Cybernet shall treat
25 any website as an Identified Website if it fails to produce such
26 documentation for all such content.

1 8. Cybernet shall not include on its website or in
2 promotional materials any statements that the Adult Check
3 websites include images or "fake" images of celebrities for which
4 Cybernet has received notice that the celebrity objects to the
5 use of his or her image unless the reference reasonably reflects
6 content on the websites for which Cybernet can produce Rights
7 Documentation.

8
9 9. As used here, "Identified Celebrities and Models" shall
10 mean any person who has assigned to Perfect 10 their right of
11 publicity or any person who has complained to Cybernet about use
12 of their images on Adult Check affiliated websites, in so far as
13 these persons are identified in the Third Amended Complaint in
14 this action, or any content concerning such persons, unless
15 Cybernet can produce Rights Documentation that the particular
16 content is authorized. "Identified Celebrities and Models" also
17 shall include any person identified by Perfect 10 in a written
18 statement delivered to Cybernet's designated agent, such written
19 statement for right of publicity allegations directly asserted by
20 Perfect 10 meeting the substantive requirements of 17 U.S.C. §
21 512. "Identified Celebrities and Models" shall also include any
22 new person complaining to Cybernet about the use of his or her
23 images on Adult Check affiliated websites. Cybernet shall make
24 publicly accessible a list of all "Identified Celebrities and
25 Models," identifying their objection to the use of their images
26 on Adult Check affiliated websites.

1 10. As used herein, "Rights Documentation" shall consist of
2 a written license agreement or consent statement, signed by the
3 person or persons whose images or identity is invoked or the
4 person or persons' authorized agent, authorizing the display of
5 the image on Adult Check websites, or a statement, under penalty
6 of perjury, declaring why the website operator believes the
7 display is authorized.

8
9 11. As used herein, "Perfect 10 Works" shall mean any
10 copyrighted image or work of Perfect 10, or any part thereof.

11
12 12. Within ten (10) business days of the date of this
13 Order, each of the Defendants shall serve upon plaintiff and file
14 with the Court a report of compliance identifying the steps each
15 has taken to comply with this Order. One hundred days following
16 the date of this Order, Cybernet shall serve upon the plaintiff
17 and file with the Court a further report of compliance
18 identifying the steps it has taken to comply with Paragraphs 6 &
19 7 of this Order.

20 ///

21 ///

22 ///

23 ///

24 ///

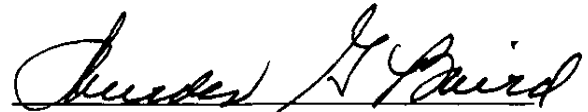
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26 ///

1 This Order shall be effective upon the filing of a bond in
2 the amount of Six Hundred Thousand Dollars (\$600,000) by
3 plaintiff.

4
5 IT IS SO ORDERED.

6
7 Dated: April 22, 2002

8 

9 LOURDES G. BAIRD
10 United States District Judge
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